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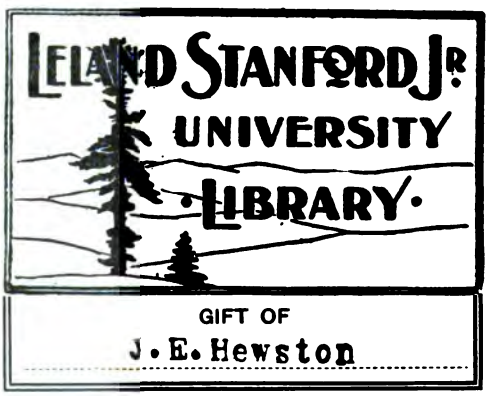
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A

DIGEST

OF THE

Law of Actions and Trials.

AT

NISI PRIUS.

VOL. I.

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A DIGEST

OF THE

Law of Actions and Trials

AT

NISI PRIUS.

BY ISAAC 'ESPINASSE,
OF GRAY'S INN, ESQ. BARRISTER AT LAW.

THOMAS & THOMAS' SECOND WALPOLE EDITION, BEING THE THIRD AMERICAN, PAGE FOR PAGE, FROM THE THIRD LONDON, EDITION, CORRECTED.

WITH CONSIDERABLE ADDITIONS FROM PRINTED AND MANUSCRIPT CASES.

Et spes et ratio Studiorum.....JUV.

IN TWO VOLUMES.

VOL. I.

WALPOLE, *N. H.*
PRINTED FOR JUSTIN HINDS,
.....
BY GEORGE W. NICHOLS.
.....
1808.

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TO THE

THIRD LONDON EDITION.

Where the indulgence of the public has sanctioned, by its approbation, any literary production, it becomes the duty of the Author, when another Edition is offered to the world, to render it if possible as correct as the subject will allow. The following work can only derive its value from accuracy in collecting, and from industry in compiling the whole of the Cases which comprise the Law of **Nisi Prius.** *This in the present Edition the Author has endeavored to attain. The decisions are brought down to the present period, and embodied into the Work, where they apply. The Errors in the former Editions are corrected, where the Author's observation, or the communication of others, pointed them out.*

CHANCERY LANE,
FEB. 14, 1798.

Preface

TO THE

SECOND LONDON EDITION.

WHEN the Profession have long been in possession of a Work of established Reputation, sanctioned with the name of an Author high in situation, and still more eminent for talents and great legal information, some account may perhaps be deemed necessary of the motives which have induced me to obtrude on their attention the following Publication. In detailing these motives, it is impossible to avoid observation on what appear to me to be the defects of that work. Nothing but an attempt to correct these defects, and to submit to the World another Publication, aiming at least at improvement, can justify this claim to public attention. In pointing out, however, those defects, it is very far from my intention to depreciate the labours of the learned Author who has preceded me. I can separate a very high personal respect, from that which I bestow on a work given to the World, though sanctioned with his name : I can, in common

mon with the rest of my profession, do the ample justice of unlimited admiration to the great discriminating powers of that learned Judge, and to that great extent of legal accuracy and learning which marks his opinion on every question of importance which comes before the Court,—while I look in vain for those marks of superior powers in the Introduction to the Law of Trials at *Nisi Prius*.

But as talents very inferior may improve on the labours of those who have preceded them; as in this country, he who has directed his studies to pursuits in any manner useful to the Public has never failed of his reward, I feel a confidence that the following Work will be deemed an honourable effort in profession, evidence at least of one essential requisite in a Lawyer,—professional attention and assiduity.

Before the publication of the Introduction to the Law of Trials at *Nisi Prius* by Mr. Justice Buller, there was no regular work on that subject: it was only to be collected from detached Treatises on the different Actions. By this learned Author were these different heads first collected and published, with the addition of several Manuscript Cases, highly useful to the Profession. And though in the Preface to the last Edition, the learned Author mentions his Book but as a *Vade Mecum* for the Circuit, it was certainly used by the younger part of the Profession for a very different purpose: it was used by them as an Elementary Book on the Law of *Nisi Prius*, as a necessary

cessary Volume of preparatory legal information. With this view I first consulted it. Used, from long and early pursuits at the University, to method, to order, and arrangement, as necessary to the clear and accurate conception of any object of study, the glaring defect of the law of *Nisi Prius* in this respect could not fail to strike me. On subjects wherein nice and subtile distinctions abound, wherein discrimination forms a very leading feature in professional ingenuity, if the several cases on the same head are unarranged, are dispersed in different parts of the Volume, and not placed in a regular or contrasted point of view, these distinctions are easily lost. If considered as a *Vade Mecum* for the circuit, or merely as a Book of Reference, this objection is equally strong: cases on the same point, to be searched for in different places, are found with difficulty, and are but ill suited to the facility of finding required in a Book of Reference, often necessary to be consulted during the hurry of a trial.

This objection might alone, perhaps, justify an attempt to amend it; but a closer attention pointed out another considerable defect in that work. Most of the cases, since the beginning of the Reign of George the IId. are given *as of the term in which they were decided.* These cases are found, with very few exceptions, in Strange, Burrow, or in those other excellent Reporters which the present reign has produced:

ced: and though they derived additional authority from being recognized by the learned Judge, by his having admitted them into a Work to which his name is prefixed, yet they would certainly be more useful to the Profession, who might have occasion to refer to them, to find them in the Reporters, where they are more at large, than in the abridged form they assume in the Law of *Nisi Prius*.

Such were the objections to the form in which that work was given to the world; but it may, perhaps, be considered as a more serious objection, that several very material heads of the Law are totally omitted. The Law of Policies of Insurance, a part of the law of great extent and importance, is not touched on at all: the Law of Bills of Exchange and of Bankruptcy very imperfectly: and not a Case is to be found in the whole Volume on the head of Toll, Fishery, Consignment, and many other heads, which I have given in the Chapters of Trespass and Case. These omissions I have attempted to supply; and have availed myself of the valuable Collections of Mr. Cooke, Mr. Park, and other Gentlemen who have published on the different Subjects of the Heads I have mentioned.

With respect to the method which I have adopted, the approbation or censure which it may meet with can neither be obtained

obtained or averted by any observation I can make. A great and liberal profession knows its difficulties, and will allow for its defects. When I first gave it to the World, I risked its success under every disadvantage. With a name unknown but in the circle of that Society of which I am a Member, I offered it to the World as an arranged Collection of Cases on the most important part of the Law, that which is the subject of daily litigation, and in which every individual of society has a degree of interest. I owe to liberality a debt of gratitude; its success has far exceeded its merits.

To collect Cases under any head of the Law, without respect to principles or arrangement, is a matter of no difficulty; but cases deciding no principle are useless: Reports are valuable only as furnishing these principles as authorities to direct the Profession in future.—With this view, I was induced to attempt to extract principles from Cases where they were not obvious. These principles I have distinguished by inverted commas; by this means it is easy to ascertain whether my conclusions are warranted by the Cases or not, as in such case I have always given them at length.

References to the Reporters, merely by the page, are liable in the printing to considerable incorrectness. I have endeavored to obviate this, by always giving the *name of the Case* which is easily found by the Index to the Reporter.

In

In compiling Cases so different in subject, dispersed in such a variety of volumes, often obscure and complicated, I am sensible that error is scarcely avoidable. As this Work was originally undertaken only with a view to my own improvement, as part of my professional studies; as it was not written with a view to profit, or pressed into light by the urgency of a book-seller, I have endeavored to render it as correct as time and care could make it: the Cases are fully compiled, nor am I aware that one is omitted from the modern Reporters, or which is to be found in the Introduction to the Law of *Nisi Prius*. In that work, little attention has been paid to the embodying, in the subsequent editions, the Cases decided down to the periods in which the several editions of it have appeared. In giving these decisions, I conceive much of the utility of a Publication of this sort depends; and to that I have directed my greatest attention.

With respect to the Manuscript Cases contained in this Edition, as they can derive no authority from my name, I think it therefore incumbent on me to inform the Profession of the source from whence I derived them: Great part of them were contained in a note-book which was lent to me by a very respectable member of the profession, as having formerly belonged to a learned Judge, who, before his promotion to the

the Bench, was eminent as a Special Pleader, and transcribed by his pupils for their own use, by his permission.

In all the other Cases which have occurred within the period of the last five years, and in which I have given the several points ruled at *Nisi Prius*, I have either myself been of Counsel, or I have taken the note in Court: for their accuracy I therefore can answer.

To compile a work containing a full collection of the decided Cases on the several branches of the Law, as it occurs on trials at *Nisi Prius*, must be of considerable use and importance, particularly on circuit. This Collection I have labored to render as complete as possible; the liberality of the Profession will, in the difficulty of the undertaking, find much excuse for fault, and suffer it to atone for its defects.

GRAY'S INN,
March 22, 1793.

GENERAL

GENERAL INTRODUCTION.

ACTIONS as tried at *Nisi Prius* are the different modes of redress which the law has given for injuries; by which the party recovers damages proportioned to the injuries he has sustained by the verdict of a Jury.

These damages arise either from the breach of any *contract* which the parties have entered into, or from the commission of some positive *injury or wrong* unconnected with any contract or agreement whatever.

Actions at *Nisi Prius* are therefore reducible to the two heads of actions founded on Contracts, or on Torts or Wrongs.

Actions founded on contracts are either on *simple contracts*, as verbal agreements, notes or contracts unsealed; or on *special contracts*, as deeds, instruments under seal, recognizances, or judgments.

These form the actions of, 1st, Assumpsit: 2dly, Debt: 3dly, Covenant.—The first on simple, the two latter on special contracts.

Actions founded on torts or wrongs constitute what are termed actions of *Trespass*.

Trespass is either *vi et armis*, or *on the case*; that is, where the

the trespass is *immediately injurious*, and accompanied with some degree of force, or violence, or where it is unaccompanied with force, *and in its consequences only injurious.*

Both species of actions may be divided into actions of Trespass as they respect, 1st, The Person: 2dly, Personal Property: 3dly, Real Property, or Chattels Real.

Trespass *vi et armis* therefore is divisible into the actions of, 1st, Assault and Battery: 2dly, False Imprisonment: 3dly Adultery—or Trespass considered with reference to the *person:* 4thly, Replevin: 5thly, *Trespass*, properly so called—or Trespass with respect to *personal property:* and 6thly, Ejectment—or Trespass with reference to *real property.*

Trespass on the Case is in like manner divisible into, 1st, Slander: 2dly, Malicious Prosecution—or case considered with reference to the person: 3dly *Trover*—or case considered with reference to personal property: 4thly, Trespass on the Case, properly so called, which takes in injuries to real property.

Of each of these I shall treat in their Order.

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CHAPTER

CHAPTER I.

The Action of Assumpsit.

ASSUMPSIT is an action whereby damages are recovered for the breach of any promise, contract, or undertaking.

These contracts are either express or implied: both are equally grounds of this action; for the obligations of natural justice are equally strong as the most express promise, in the eye of the law.

Assumpsit is of two sorts: 1st, *Indebitatus assumpsit*, which in its nature is an action of debt, and lies in cases where debt would lie: for in *indebitatus assumpsit* the plaintiff recovers not only damages for the special loss, if any, but to the amount of the whole debt; and therefore a recovery in this action would be a good bar to an action of debt brought upon the same contract. 2d, A special *assumpsit*, in which the damages are not in the nature of debt, but as a compensation for injury.

Slade's case, 4 Co. 92.

Id. 4 Res. 4 Co. 94. b.

In treating of this action I shall consider it, 1st, On the ground of the contract itself: 2dly, As the contract has reference to the person: 3dly, The pleadings and evidence: 4thly, The verdict and judgment.

I. OF ASSUMPSIT CONSIDERED WITH REFERENCE TO THE CONTRACT.

Under this head may be considered: 1st, On what contracts this action may be maintained: 2dly, On what contracts it cannot be supported. And,

1. ON WHAT CONTRACTS IT MAY BE MAINTAINED.

These contracts are either implied or express.

1. OF IMPLIED CONTRACTS.

Assumpsit being in its nature an equitable action, it is a general description of all cases wherein it lies, that the defendant is obliged by ties of natural equity and justice to refund money which he may have received of the plaintiff's, or to pay it, if the plaintiff has a legal right to demand the same. It lies, therefore,

Per Lord Mansfield. 2 Burr. 1012.

*"1. To recover back money paid under a *mistake*, or "through *the deceit* of the other party."

Ibid.

As if an underwriter pay money on an insurance of a ship supposed to be lost, which afterwards arrives safe, he shall recover back the money so paid. 2 Bur. 1010.

De Hahn v. Hartly. 1 Term Rep. 343.

So if an underwriter pay money on a policy containing a warranty, and it afterwards appears that the warranty has not been complied with, he shall recover back the money so paid.

Bize v. Dickson
Ass. of Bartons
Shlag. 1 Term
Rep. 285.
Grove v. Dubois.
Id. 112. S. P.

So where the plaintiff was a broker with a commission *del credere*, and the bankrupt had been an underwriter, and had underwritten policies to a large amount for the plaintiff for his foreign correspondents; losses to the amount of 661*l.* had happened on those policies, and the plaintiff had paid them to his correspondents in consequence of the *del credere*, and the bankrupt was therefore indebted to the amount of these losses to the plaintiff, and the plaintiff was by him made debtor for the premiums: at the time of the bankruptcy the plaintiff was indebted to the bankrupt in 1356*l.* *the whole of which sum* he paid to the assignees of the bankrupt, *not knowing that he was intitled to hold the amount of the debt due to him, as a set off under stat.* 5 *Geo.* 2. 30. *sect.* 28; afterwards discovering his mistake, he brought this action for the 661*l.* which he was intitled to have retained; and recovered it.

Masser v. Wallis.
Salk. 28.

So where the plaintiff, being a feme sole, married the defendant *Wallis*, who was in truth married to another woman, he made leases of her land, and received the rents from the tenants. The plaintiff afterwards, discovering the *deceit*, brought *indebitatus assumpsit* against him for the rents so received and recovered.

Per Justice
Buller. 2 Term
Rep. 648.

The only exception to this rule is the case of the payment of money into court: where money is so paid, the party can never recover it back again, though it afterwards appear that he paid it wrongfully; for that is a payment on record.

2 Burr. 1012.

2. "To recover money paid for a *consideration which hath "pens to fail.*"

Shove v. Web.
1 Term Rep.
732.

As where the plaintiff had paid to the defendant a sum of money for an annuity, the memorial of which, not having been duly registered in pursuance of stat. 17 *Geo.* 3. 26. (for which informality the annuity is made void by the statute) it had been set aside by the Court of Common Pleas; the plaintiff (the grantee) was allowed to recover back the consideration-money so paid by this action for money had and received, the consideration for which it had been paid having failed.

Stratton v.
Rastall.
2 Term Rep.
366.

So where the defendant had joined the person who sold the annuity to the plaintiff, merely as a security, but in reality never had received any part of the money, though he had signed with the other the receipt for the purchase-money, and the annuity was void under the statute, not having been registered.

registered, it was adjudged that the defendant was not liable; for the plaintiff had no equity on his side, the defendant having received no part of the purchase-money, and the defendant meant only to make himself security for the regular payments of the annuity.

* So where the plaintiff paid money to the defendant, on the defendant's promise to make him a lease of land, and before the lease made, the defendant was evicted, the plaintiff recovered his money by this action, the consideration not having been performed. Brigg's case. Palm. 364. *[3]

" 3. To recover back money paid to any one acting under or in pursuance of a *void authority*." 2 Burr. 1102.

As where the defendant, being really indebted to the plaintiff, one *Davis* forged a power of attorney, and empowered an attorney of the name of *Hodgson* to bring an action in the name of the plaintiff against the defendant; the action was brought in the Court of Common Pleas, and the defendant paid the money into court, which *Hodgson* took out and paid it over to *Davis*, who then absconded. On the plaintiff's bringing his action for the money, it was adjudged that the payment so made, could be no payment to the plaintiff, but that the defendant was still liable to him, though the defendant might have his remedy against the attorney, who had received the money under a void authority. Robson v. Eaton. 1 Term Rep. 59.

So where *H.* having letters of administration, appointed the defendant his attorney to receive money owing to the intestate, who received the same, and paid it over to the administrator: afterwards a will appearing, the letters of administration were called in by citation and repealed, and the executor now brought *indeb. assumpsit* against the defendant for the money so received and held well to lie; for the administration was void, and the attorney acted without any authority, and so an implied contract was raised, and the defendant chargeable. Jacob and Allen. 1 Salk. 27.

" But without impeaching the rule, that money paid under " a void authority may be recovered back again by this action, " the authority of the last case may be questioned; inasmuch " as *that* shall not be deemed a void authority, which *is given* " *by a court having competent jurisdiction*."

For where the defendant, as Treasurer of the Navy, was indebted to one *Priestman* in a sum of 58*l.* *Priestman* died 2d *June*, 1784; and on the 13th *August*, 1785, one *Brown forged a paper*, purporting to be the will of *Priestman*, by which he was made sole executor, *and probate was granted of it to Brown* accordingly, who under such authority received from the defendant the money due to *Priestman*. Afterwards the fraud appearing, *Brown* was cited, and not appearing, the will and probate were declared to be void, and administration granted to the plaintiff, who now brought *assumpsit* for Allen v. Dundas. 3 Term Rep. 125. [4]

for money had and received against the defendant: the Court were of opinion, that the defendant having paid the money to a person having authority from a court of competent jurisdiction, that such payment was lawful, and that he should not be compellable to pay it again.

S. C. But the court seemed to be clearly of opinion, that *had Priestman been living*, and an instrument as above been forged, and the defendant had paid the money, that it would have been recoverable; for in such case the ecclesiastical court would have had no jurisdiction, the party being living, and so the authority would have been void.

"Therefore, if a person *pays a forged bill or bond or such* "*like security*, it is no discharge against the real creditor, for "*the authority is clearly void.*"

Cheap v. Harley, & alt. quot. 3 Term R. 127. Robson v. Eaton, ante 3. As where the defendants, who had a house both in *America* and *London*, drew two bills in *America* of the same tenor and date, on their house in *London*, in favour of the plaintiffs; one of them being lost, came to the hands of a third person, *who forged the payees' indorsement* and received the amount of it from the defendants: afterwards the real payees sued them on the other bill, when the payment of the forged one was held to be no discharge, and the plaintiffs recovered the amount of it.

Sir R. Newdigate v. Davey. 1 Lord Raym. 742. So where a sum was ordered to be paid by the *High Commission Court* by the plaintiff to the defendant, the plaintiff was afterward allowed to recover it back, because ordered to be paid by a void authority, the action being brought after the Revolution.

2 Burr. 1012. "4. To recover back money obtained from any one by *ex-* "*tortion, imposition, oppression, or taking an undue advantage* "*of the party's situation.*"

Astley v. Reynolds. 2 Stra. 915. As where the plaintiff, having pawned plate to the defendant for 20*l.* at the end of three years came to redeem it, and tendered 4*l.* being more than the legal interest for that time; the defendant refused to take less than 10*l.*; upon which the plaintiff paid the 10*l.* and had his goods, and now brought his action for the surplus above legal interest so extorted from him; and on a case made, the Court held the action maintainable for the money so obtained from him against his consent. *Note*, It was in this case objected, 1st, That the plaintiff should not have paid the money, but have brought trover; but this was over-ruled, as the plaintiff might want his plate immediately. 2dly, That *volenti non fit injuria*, he having voluntarily paid his money. But, it was answered, That that only holds where the party has a freedom of exercising his will; which here he had not.

*[5]

Smith v. Bromley. Dougl. 671. So where the plaintiff's brother was a bankrupt, and she was induced by an agent for the defendant, who was a principal

cipal creditor, to give him 40*l.* to sign the bankrupt's certificate; the money so paid for that purpose was allowed to be recovered back in this action, as oppressively and unjustly extorted from the plaintiff.

So in *assumpsit* on a promissory note, the circumstances were, that the defendants being considerably indebted to the plaintiff, and other creditors, and being insolvent, assigned over all their effects in trust, to pay eleven shillings in the pound to all their creditors, to which they all consented, except the plaintiff, who refused to sign the deed, or receive any composition, unless the defendants would give him a note for the remaining nine shillings: on which the defendants gave him the note in question, to that amount; and then the plaintiffs signed the deed. On an action being brought on this note, it was resolved, That this note having been obtained under the circumstances of taking advantage of the defendants' situation, and being a fraud on the other creditors, *was void;* and, though the defendants had made a subsequent promise to pay, that this should not set up that security, which was void in its creation. Cockshott v. Bennet, & al. 2. T. Rep. 763. Vide Lloyd v. Lee. 1 Stra. 94.

"5. This action lies to recover back money *embezzled*, or "which any person has been *defrauded of* by cheating, or "otherwise."

As where the defendant was nurse to a person on his death-bed, and when he died went off with the money he had about him, the administrator of the person deceased was allowed to recover back the money so embezzled, by this action, as money had and received to the plaintiff's use; and Lord Chief Justice *Parker* said, he would presume a subsequent agreement to make a contract of it, and the bringing the action was an admission of such consent. Whip v. Thomas. Trin. 1. Geo. 1. Bull. N. P. 130.

"And the owner shall recover the property embezzled, "though not in the hands of the person embezzling it, but "of a third person, if such person has obtained it illegally, or "*mala fide.*"

* As was this case, wherein a clerk to the plaintiff had embezzled notes and money of his to a considerable amount which he had paid away in the insurance of Tickets in the lottery to the defendant, which insurance was contrary to stat. 12. *Geo.* 3. *ch.* 36. it was held, That as these notes and money were not paid *bona fide*, but for an illegal consideration, and as their identity could be traced, the real owner should recover them. Clarke v. Shee & al. Cowp. 197. *[6]

"6. If money has been recovered in consequence of any "*judgment or adjudication, if such was erroneous*, and is re- "versed; or if money has been paid in consequence of the "judgment of an inferior court, where, from the limits of "its jurisdiction, the merits could not be tried, it shall, in "this action, be recovered back again." Burr. 1069.

As

Feltham v. Terry. B. R. East. 13 Geo. 3. Buller N. P. 131. Quot. Cowp. 419.

As where the defendant levied money by seizing and selling the plaintiff's goods, under a justice's warrant, founded on a conviction, which *conviction was afterwards quashed*, it was holden that an action for money had and received then lay, for the clear money produced by the sale.

Moses v. M'Farlane. 2 Burr. 1005. 2 Black. R. 219. S. C.

So where the plaintiff had been sued in an inferior court, and had matter of defence, of which, if he could have availed himself, it would have discharged him, but which, from the nature of the court, he could not have, and so had judgment there against him, and had paid the money; he recovered back the amount of such judgment by this action.

"7. Where any species of contract, or other matter, is by "law or statute declared to be illegal and void, money paid "in consequence of such contract may be recovered back "by this action by the party who paid it, provided he was "not himself a *particeps criminis* in the illegal transaction."

Jaques v. Golightly. 2 Black. Rep. 1073. Jaques v. Withy. H. Black. Rep. 65, S. P.

For where by act of parliament all insurances on the lottery were prohibited and declared to be illegal in the lottery office-keeper, and void, and the plaintiff had paid to the defendant a sum of money as a premium on the insurance of several numbers in the lottery, contrary to the act, he brought this action for the money so paid, and recovered it.

S. C.

But *(per* Just. *Blackstone)* where *both parties are made criminal*, in such case the money cannot be recovered back again, as the stock-jobbing act, 7 *Geo.* 2. *ch.* 8. in which both parties are made criminal and liable to penalties; but under the lottery acts, the office-keeper only is made criminal, and therefore the party who has paid the money, not being criminal within the statute, he may recover back the money he so paid.

[7]

Booth v. Hodgson. 6 Term Rep. 405. Mitchell v. Cockburn. Post. 88. S. P.

So where the plaintiff and defendant became partners in making insurances contrary to statute 6 *Geo.* 1. *ch.* 18. *s.* 12. and one received the whole of the premiums, it was held that the other could not recover his share of them in this action.

"And *a fortiori* he who has himself only committed the "illegal act shall not be allowed to recover back money so "paid."

Browning v. Morris. Cowp. 790.

As where the *plaintiff was a lottery office-keeper*, and had paid to the defendant several sums of money, *being losses on numbers which the plaintiff had insured*, and he now brought his action to recover back the money so paid, the action was adjudged not to lie, for the illegal act had been done by himself in making the insurance; and he having paid the money from a motive of honesty, though not compellable by law, should not recover it back.

Drummond v. Decy, Espin. N. P. C. 153. Vide King v.

But in this case a distinction was taken. In an action to recover back the amount of several premiums paid by plaintiff to defendant for illegal insurances in the state-lottery,

it

it appearing in evidence that the plaintiff was connected with the defendant in these illegal insurances, and that the sums which he had paid over to the defendant, and for which the action was brought, were the sums paid by the different persons making the insurances as premiums on the policies, it was ruled, That if a person is ignorantly engaged in an illegal transaction through the imposition of another, and pays his money in pursuance of it, though he is a *particeps criminis*, yet he may recover the money so advanced, as obtained through fraud; but that where a person knew that he was violating a positive law, when he engaged in such illegal transaction, in such case the party should not be allowed to recover back his money from the person who was *particeps criminis*. Scrape. Espin. N. P. C. 432.

These are cases of implied contracts, in which the defendant, having obtained possession of the plaintiff's property, is compellable by this action to restore it. A similar obligation arises where the law has given a claim against any one. In this action such claim is asserted and recovered.

As in those cases: 1st, If a person becomes a *member of* "*any society or company*, he thereby agrees to abide by all le-"gal claims arising against him from the bye-laws or local "regulations of that society to which he belongs."

Therefore *indebitatus assumpsit* was held to lie against the defendant for 20*l.* being the penalty forfeited by the bye-law of the company for not serving the office of steward, in pursuance of such bye-law. Barber Surgeons' Company of London v. Pelson. 2 Lev. 252.

So was the action held to lie for scavage; it being found to be due in *London* by custom. Mayor of London v. Sory. Carth. 92.

"2. So where a power is given by law to impose any as-"sessment on the subject, the implied consent of every per-"son to abide by any legal decision or adjudication, raises "an implied contract to pay such assessment, which is the "foundation of an *assumpsit*."

Therefore, where, by an act of parliament, power was given to commissioners to divide common fields, and to make such regulations and orders as they should think fit, they awarded that all proprietors of land allotted to them, which had been ploughed or manured since any corn had been reaped, should pay to the person who had manured it four shillings per acre; general *indebitatus assumpsit* was held to lie for it. Bell v. Burrowes. C. B. East. 5 G. 3 Bull. N. P. 129.

So general *indebitatus assumpsit* was held to lie for tolls. Seward v. Baker. 1 T. Rep. 618.

So for petit customs *indebitatus assumpsit* lies. Mayor of Exeter v. Trimlett. 2 Wils. 95.

"3. Wherever the law has given to any person certain "*fees or rewards for his employment or trouble*, in this action "they are recoverable."

As

Sir William Saunderson v. Bignall. 2 Stra. 747. Duppa v. Gerrard. Show 78.

As where the plaintiff in this action recovered the fees due to him as Usher of the Black Rod.

So the fees on being knighted were recovered against the defendant by the ushers and daily waiters to the king.

Stockhold v. Collington. Salk. 330.

So where one was named a commissioner to examine witnesses in a cause out of Chancery, and officiated accordingly, he recovered his fees in this action.

Boyter v. Dodsworth, 6 Temp. 682. & post. 86.

But they must be settled fees, not mere *gratuities*, as for such no action will lie.

In this form of action *Attornies* recover their fees; as to whom it is enacted by stat. 3 *J.* 1 *ch.* 7 *sect.* 1. that every attorney "shall give to his clients true bills of all the charges "of suit under his own hand, before he can charge his client "with payment thereof."

And by stat. 2 *Geo.* 2 *ch.* 23 *s.* 23. "No attorney or so-"licitor shall commence or maintain any action for fees or disbursements at law or equity, till the expiration of one month after he shall have delivered to the party, or left for him at his "dwelling house, a bill of such fees, &c. written in a common "hand, and in *English* (except law terms, and names of writs) "and in words at length (except times and sums) and subscribed with his proper hand."

On these statutes it has been decided,

Barnes 26. Clarke v. Godfrey. 1 Stra. 633.

1. If an attorney brings an action on his bill, the Court will stay proceedings till he has delivered a bill to the defendant; for before that, under the statutes, he cannot maintain an action.

Bullman v. Birkett. Espin. N. P C. 449.

But where an action is brought *against an attorney*, and the plaintiff is indebted to him in a bill for business done, the attorney may give his bill in evidence *as a set off*, though it has not been a month delivered: but it should be delivered time enough before the trial, for the plaintiff to have it taxed.

"And the bill must be *left with the client* for a month be-"fore the attorney can sue him on it."

Brooks v. Mason. H. Black. Rep. 290.

For where the circumstances were, that the attorney had delivered his bill in due time to the defendant, who acknowledged the debt and said he would pay it, but that he did not know what to do with the bill: upon which the plaintiff (the attorney) *took it back again*; and at the end of the month brought his action on it. He was nonsuited; the judge being of opinion, That the bill ought to *be left with the defendant*; it being the intention of the statute, that the client should have time to examine the charges, and take advice *on them*, if necessary: and, on a motion for a new trial, the direction was held to be right.

[9]

2. If

2. If the business has been done in the *inferior courts*, it has been held that the defendant cannot take advantage of the statute, *that no bill has been delivered*; for the statute is confined to business done in the courts above. Brickwood v. Fanshaw. Show. 96.

But the law now stands otherwise: for in the case of *Clark v. Donovan*, 5 Term Rep. 694. it was ruled by Lord *Kenyon*, and afterwards confirmed by the Court of King's Bench, that though the whole of the business done by an attorney had been at the Quarter Sessions, he shall deliver his bill signed a month before he sues on it, pursuant to 2 *Geo.* 2., though it had been formerly otherwise ruled at Nisi Prius, and so held in a case *ex parte Williams*, 4 Term Rep. 124.

But it was always held, that if *any part* of the business had been done in the superior courts, the court would at all times refer the bill, though the rest had been done in an inferior court, as at the Quarter Sessions, *ex. gr.* But now, though all the business has been done at the Sessions, the court will nevertheless refer the bill to be taxed. Ex parte Williams. 4 Term Rep. 496.

3. Though the statute is a good plea to an *indebitatus assumpsit* generally, yet to a special promise, or *insimul computasset*, it is no plea. Salk. 26.

4. The statute does not extend to business done in conveyancing, nor to the executor of an attorney: and it may be given in evidence on the general issue. Bull. N. P. 145. Milner v. Crowdall. Show. 338.

By stat. 12 *Geo.* 2. *ch.* 13. *sect.* 6. it is enacted, that "the "stat. 2 *Geo.* 2 *ch.* 23. shall not extend to any bill of fees, "charges and disbursements that are now, or shall hereafter "become due from any attorney or solicitor to any other at-"torney or solicitor."

Under this statute it has been held, that where the defendant was an attorney at the time of the action brought, though not at the time of the business done, that the plaintiff might maintain an action for the business so done, without having delivered a bill signed pursuant to stat. 2 *Geo.* 2. Ford v. Maxwell. Espin. Cas. N. P. 420. 2 H. Black. 589. S. C.

So where the business done has been agency business, it was held that the plaintiff was not obliged to deliver a bill signed pursuant to the stat. 2 *Geo. ch.* 23. Nelson v. Garforth. Espin. Cas. N. P. 221. Bridges v. Frances. Peake 1. S. p.

5. If an attorney brings an action for his fees, the court will not stay proceedings on it, nor refer it to a Master, unless the business, or at least part of the business, has been done in the court where the action is brought. Gregg's case. Salk. 89.

6. And where an attorney has furnished his bill, and the client does not refer it to a Master to have it taxed, but he drives the attorney to an action, the defendant shall not be Williams v. Frith. Dougl. 188.

admitted, before a jury, to question the *reasonableness of the items* contained in the bill.

Phil. v. Roach, Heref. Sum. Ass. 1762. MSS.

Neither shall he be put to prove the several items having been actually done, for that is a matter proper to be inquired of on a taxation, not before a jury; and the client's acquiescence, and not applying to have the bill taxed, is an admission both of the business done, and the reasonableness of the charges.

Anon. MSS.

[10]

However, in a cause before Mr. *Baron Smyth*, at Stafford, the next year, the foregoing case being cited, he said it was to be understood with some restriction; and could only mean that every small item need not be proved, but that there must be a foundation laid, by shewing the existence of the causes and business for which the charges were made, and proving the main articles.

7. "The courts in favour of clients have construed the stat. "2 *Geo.* 2. very strictly, so as in no case to dispense with the "necessity of delivering a bill."

Miller v. Towers. Peake N. P. Cas. 102.

For, in action of *assumpsit* on an attorney's bill, and for money paid to the defendant's use, it appeared that the defendant having employed the plaintiff, as his attorney, to bring an action, and having failed in it, the attorney had *agreed to take the cost out of pocket*, and now brought his action to recover them, without having delivered any bill; Lord *Kenyon* ruled, That he could not give this in evidence under the count for money paid, as, if it were so, many of the beneficial consequences of the act of parliament might be evaded; for by agreeing to take the costs out of pocket, an attorney might always prevent a nonsuit, when the objection was made.

4. "Wherever the law has imposed *any duty* upon a per- "son, and given him certain *allowances or charges for it*, he "shall recover them in this action; but in such case the duty "must be performed, and the party's claims be limited ac- "cordingly."

As where, by stat. 22 *Car.* 2 *c.* 11. *s.* 21. it is enacted, "That the rates for cranage and wharfage on the river "*Thames* shall be assessed and allowed by his Majesty and "Privy Council, and no others be taken; and obliges wharf- "ingers, under a penalty, not to refuse to suffer any goods "or merchandise to be landed or shipped at or from such "wharf."

Stevens v. Costor. 3 Burr. 1498. 1 Black. Rep. 413. S. C.

It was resolved in this case, That where an order of Council had been made pursuant to that statute, regulating the rates of cranage and wharfage, That where a vessel was fastened to the wharf, such rates were recoverable by this action, as far as the wharf or crane were used; and therefore

therefore it was to be paid only for goods *actually landed*, and for which the wharf had been used; not for goods taken from on board the same vessel, and carried off in lighters, while she lay at the wharf.

So where, under stat. 22. *Geo.* 2. *ch.* 40. the trustees of Ramsgate Harbour, being bound to keep it in repair, have a power to impose a duty of 6*d* a ton on every ship loading, discharging, or sailing *from, to, or by Ramsgate*, or coming into harbour there; and this action was for 3*l.* 10*s.* assessed on the defendant's ship as sailing by Ramsgate. It was found by a special verdict, "That the vessel had sailed four leagues S. E. of the Goodwin Sands, and not within the Downs, or in sight of Ramsgate, and that ships sailing in that course rarely receive assistance from the Ramsgate pilots, Deal being equally near." On this finding, the defendant had judgment; for the act confined the duty to ships only coming into the Downs, which was the situation in which *they were likely to be advantaged by Ramsgate Harbour*, not to ships which could receive no benefit from it. Pole v. Johnson. 2 Black. Rep. 764.

2. "These are the most material grounds of this action "arising from the implication of law: I shall now proceed to "such as arise from *express undertakings*."

OF EXPRESS CONTRACTS. [11]

The principal species of Express Contracts which I shall consider, are.

1st, Contracts founded on Sales.

2d, On Wagers.

3d, For Use and Occupation.

4th, On Bills of Exchange and Promissory Notes.

5th, On Policies of Insurance.

1st, OF ASSUMPSIT ARISING ON SALES.

This action, founded on sales, may be either at the suit of the vendor for the price of the thing sold, or of the vendee to recover back the money he has paid, some defect appearing in the thing sold, or fraud in the vendor; the first on the express; the latter on the implied undertaking.

1. "If a contract is made on a sale, it is always supposed "that the vendor has a good title; if therefore there is any "concealment of the circumstances affecting the title, and the "vendee has paid the purchase-money, he may waive the bar-"gain, and recover back his money."

As where the defendant, who was an auctioneer, had sold to the plaintiff an interest in land, for which the plaintiff had made a deposit of 50*l.* but there appearing an objection to the title, and the want of disclosure of some circumstances, which should Borough v. Skinner. 5 Burr. 2639.

should have been disclosed at the bidding, the plaintiff declined going on with the contract, for sufficient reason, in the opinion of the Court. In consequence of which he recovered back the deposit so made.

" And where a purchase is made at an auction, though it " may consist of several lots, if from the nature of the con- " tract it is entire, the seller must make a complete title to " the whole of it ; for otherwise the buyer may consider the " bargain as void, and recover back his deposit."

Chambers v. Griffiths. Espin. N.P.C. 150.

For where in an action to recover the amount of a deposit made by the plaintiff on a sale by auction of several houses of the defendant's, it appearing in evidence that the houses in question, with several others, had been put up to sale in lots, the plaintiff had bid for three of these lots, which were knocked down to him, and he had paid the deposit required : one of the conditions of the sale was, " That the purchaser " was to have a good title made out to him within one month :" within the month the seller sent an abstract of the title to *one* of the houses, but shewed no title to the others ; and the question was, Whether the plaintiff had a right to consider the whole contract at an end, and to recover his deposit as well for that to which the defendants had made a title, as those to which he had made none ; it was ruled by Lord *Kenyon*, that the purchase of these several lots was an entire contract, and that the purchaser had a right to rescind the agreement as to the whole, and to recover the whole of his deposit, the sellers having failed in making a title to two of the lots ; as the want of a title to part of a contract of this sort, might leave that to which a title was made, of no value.

Flureau v. Thornhill. 2 Black. Rep. 1078.

But in such case where the title is not good, the person who had become the purchaser can only recover back his *deposit*, with interest ; not any farther damages for the supposed loss of a good bargain.

Richards v. Barton. Espin. N.P.C. 268.

Though in such case the vendor is liable to all the expenses incurred, as for conveyances ; *ex. gr.* where the sale has not been completed in consequence of his misrepresentation of his title.

" And where things are sold by auction, and in the printed " conditions of sale there is a statement and warranty of the " title, the things shall be deemed to be sold under such title, [12] " and the declarations of the auctioneer at the time shall not " be admitted to vary or qualify it."

Gunnis v. Erhart. H. Black. Rep. 289.

For where the plaintiff sold certain estates by auction, and in the printed articles they were stated to be *free from incumbrances* the defendant bid for them, and they were knocked down to him ; but afterwards discovering that there was a charge affecting them of 17 *l. per ann.* he refused to complete the purchase, for which cause this action was brought.

brought. The plaintiff offered evidence to prove that the auctioneer had at the time of sale informed the bidders of this charge, but Lord *Loughborough* refused to admit it, and nonsuited the plaintiff. On a motion for a new trial, the court concurred in his opinion, as it would open a door to fraud, to admit verbal declarations of the auctioneer contrary to the printed conditions of sale.

Note. It seems not to be material whether the auctioneer has paid over the money to his principal or not; for the court seemed in this case to be of opinion, that the auctioneer was as a stakeholder, and should not part with any deposit so made till such time as the sale should be finished and completed, and it should appear in the event to whom it belonged. Borough v. Skinner. ante 11.

But where the plaintiff sues for damages for the non-performance of a contract, the action should be brought against the principal, unless the auctioneer refuses to disclose the name of the principal, in which case he himself is personally liable. Hanson v. Roberdeau. Peake's N. P. C. 120.

2. "This is the case where there is no possession delivered "to the vendee of the thing purchased. If possession has "been given, this action for money had and received will "not lie, *unless the goods so purchased have been returned;* for "then the contract is at an end, and the plaintiff may sue "for the money."

As where the plaintiff purchased from the defendant a one-horse-chaise, for which he paid ten guineas; and it was agreed at the time of the sale, that if it did not please the wife of the plaintiff, he should be at liberty within three days, to return it, paying 3*s*. 6*d*. per day for the hire of it. Within the three days he did return it, and then brought his action for the ten guineas he had paid, when it was resolved, That the sale being conditional, he had rescinded the contract by returning the chaise, and that he might recover the sum he had at first advanced; and the plaintiff had judgment. Towers v. Barret. 1 Term Rep. 133.

"And as the contract must be at an end before this action "can be maintained, so it must be rescinded by the party "who means to sue for the money paid, *in a reasonable time*, "as otherwise he must sue on the special contract itself, "and *recover damages* for the breach of it."

* As where the plaintiff declared that the defendant had sold him a pair of horses, warranted five years old, but which in fact were proved to be but four. The plaintiff had neglected to return them in a reasonable time, and brought his action for the money. It was ruled by *Buller*, Justice, that the plaintiff, not having returned the horses in a reasonable time, could not now rescind the contract, so that it still continued, and he could not therefore recover back his money, Compton v. Burn. Sit. West. Mich. 26 G. 3. MSS. *[13] Adam v. Richards. 2 H. Black. R. 573.

ey, but that his remedy should be to recover damages on the warranty; that is, the difference of value between horses of four and five years old.

"And in such case the plaintiff must declare on the warranty or special agreement itself, *as assumpsit for money had and received* will not lie."

Weston v. Downes. Dougl. 23.

For where the plaintiff purchased a pair of horses for seventy guineas from the defendant, but which he undertook to take back if returned within a month, the plaintiff did return the first pair within the month, but took a second pair; these he also returned, and took a third, which he also offered to return; but the defendant refusing to take them, he brought his action for money had and received; and held not to lie, the contract being still open.

"But to enable the party *to maintain his action on the warranty*, it is not necessary that the thing purchased should "be returned, or notice given of the defect to the seller."

Fielder v. Starkin. H. Black. Rep. 17.

For where the defendant had in the month of March sold to the plaintiff a mare, which he warranted sound and free from blemish; soon after the sale the plaintiff discovered that she was unsound and vicious; he kept her for three months after the discovery, during which time he endeavoured to cure her; he then sold her, but she was returned as unsound, and he kept her till the October following, when he sent her home to the defendant, who refused to take her, and she died on the way. It was proved in evidence, *that she had been unsound when sold.* It was resolved, that this defect subsisting *when the warranty was made*, that the action lay, though she was not returned, nor notice given.

Anon. 1 Stra. 407.

3. "When a purchase is made, if the money is paid, and "the thing contracted for is not delivered, vendee may by "this action recover back the money so advanced, this dis-"affirming the bargain; otherwise, when the bargain is "made, the property of the goods is transferred to the ven-"dee, and that of the price to the vendor; and he may main-"tain *assumpsit* for the price, even before delivery of "the things sold, provided the sale has been a good one. "As to which, those points have been settled."

2 Black. Com. 448.

[14]

Per Ld. Mansfield. Cowp. 296.

1. "If the vendor takes upon himself the delivery of the "goods purchased to the vendee, he stands all risques; but "if the vendee points out the particular mode of conveyance "by which the goods are to be sent, and vendor sends them "according to such direction and they miscarry, the vendee "must stand at the loss."

Vale v. Bayle. Cowp. 294.

For where in an action for goods sold and delivered, it appeared that the defendant had, by letter, ordered the goods to be sent to him, and desired, "that instead of sending "them

"them by Bristol, that they should be sent *by land carriage*;" it was proved that in pursuance of this, the goods were delivered to the book-keeper of the Birmingham carrier, to be sent by way of Coventry to the defendant who lived in Carmarthen, and *that there was no other mode of conveyance by land carriage:* the goods were lost. It was resolved that a delivery according to the defendant's order was, a delivery to himself, and that he was liable for the price though they had never come to his possession.

2. By the statute of frauds, 29 *Car.* 2. *c.* 5. *s.* 6. it is enacted, "That no contract for the sale of any goods for "the price of 10*l.* or upwards shall be good, except the "buyer accepts part of the goods sold, or gives something "in earnest to bind the bargain: or there be some note in "writing of the bargain made, and signed by the parties to "be charged with such contract, or their agents lawfully au-"thorized."

Under this statute it has been adjudged,

1. "That since the statute, *no parol agreement* for the sale "of goods above 10*l.* value is good or binding on the parties, "unless there is earnest or delivery given."

For where the case was, that at Lewes Fair the plaintiff had agreed to buy some sheep from the defendant, and to take them away by a certain hour, but there was no earnest given, nor were the sheep delivered. The plaintiff not coming at the time appointed, nor sending for the sheep, the defendant sold them to another person; the plaintiff brought *trover* for them, when it was resolved that the action could not be maintained; for there was *no property in the plaintiff*, the sale being void under the statute of frauds, as there was no note in writing, the agreement being merely verbal, nor earnest or delivery given.

Alexander v. Comber. H. Black. Rep. 20.

*2. "That it extends only to cases wherein the seller is to "deliver the goods immediately, and the buyer immediately "to pay for them; that is, to contracts executed, *not to cases* "wherein the contract is executory; and *the buyer is to be* "*furnished with the goods in future, and then to pay.*"

Clayton v. Andrews. 4 Burr. 2101. *[15]

As where the defendant bespoke a chariot, and when it was made, refused to take it, and on an action being brought for the price, it was objected, That there was no earnest or note in writing, and so that the contract was void, under the statute of frauds. But it was ruled that the statute did not extend to executory contracts of this nature.

Towers v. Sir J. Osborne. 1 Stra. 506.

But this doctrine, as laid down *generally*, *viz.* "that the "*statute of frauds does not extend to executory contracts*, has "been overruled by Lord *Loughborough*, and the Court of Common Pleas, *dissent*. Mr. Justice *Wilson*; they were of opinion that it extended only to cases *where some work was to* "*be*

2H. Black. Rep. 67.

" *be performed on the thing to be sold*, such as was the case in " the two cases last cited."

Rondeau v. Wyatt. 2 H. Black. 63.

And it was accordingly decided by them that where the plaintiff and defendant had verbally agreed that the defendant should furnish 3000 sacks of flour to be shipped for foreign parts, at 41*s.* the sack, and which agreement the defendant afterwards refused to perform, that it was within the statute of frauds, and void.

And in the case of *Cooper* v. *Elston*, 7 Term Rep. 14. the law, as decided in the last case, was recognized by the Court of King's Bench in the fullest extent.

Quære, therefore, if the distinction is not, that in the cases *supra*, something was to be done to the thing sold before it could be delivered, so that *the contract could not be completed at the time*; but where the thing sold is capable of immediate delivery, whether in such case a contract so entered into, is not clearly within the statute of frauds, if immediate delivery does not follow.

3. " Goods sold at public auctions are not within this stat- " ute ; that is, no earnest or note in writing *between the par- " ties* is required."

Simon v. Motivos. 3 Burr. 1921.

For where goods at an auction were knocked down to the defendant, and his name entered in the auctioneer's book as the highest bidder ; he came the next day and saw them weighed, but failing to take them away, the auctioneer re-sold them for less than he had done to the defendant, and then brought this action for the difference of the price. Defendant relied on the statute of frauds ; that he had entered into no memorandum in writing, nor given earnest : but it was decided, that the auctioneer was to be considered as *agent*, for the buyer as well as the seller, and that *as such*, setting down the name of the buyer, the price, &c. was a sufficient memorandum in writing, within the statute to bind the sale, and that the defendant therefore was liable.

Rucker v. Cammyer. Espin. N.P.C. 105.

On the same principle, where goods were sold *by a broker*, and he agreed for the sale of them at a certain price with the defendant, and gave him a sale note of the price ; Lord *Kenyon* ruled, that he was to be considered as the agent of both parties, and the sale note, a note in writing within the statute of frauds, and the defendant bound by it.

Langford v. Admin. of Tyler. 1 Salk. 113.

4. It was decided in this case, 1st, That earnest only binds the bargain and gives the party a right to demand ; but a demand without payment of the money is void; for the money must be paid at the taking away of the goods as no other time for payment is appointed. 2dly. That after earnest given, the vendor cannot sell the goods without a default in the vendee ; and therefore, if the vendee does not come and pay for, and take away the goods, the vendor ought to

to request him to do so, and if he neglects, the vendor may sell them again in convenient time after.

Where at a sale by auction, one of the conditions of the sale was, that the purchaser was to make a deposit of 25*l. per cent.* on the whole purchase money: it was ruled by Lord *Kenyon*, that it need not be an exact 25 *per cent.* on the whole amount, but that if any money was paid as a deposit, and *accepted as such*, by the auctioneer, that it was sufficient to bind the bargain. Hanson v. Roberdeau. Sitt. G. Hall East. 1792. MSS. [16]

And whatever sum is paid for earnest, or as a deposit, is to be deemed part of the price when the goods come to be paid for. Pordage v. Cole. 1 Saund. 319.

5. "Where goods are sold by auction, the sale is not "complete to bind the buyer to the purchase, till *the lot is* "*actually knocked down to him*, until which time he may re-"tract his bidding."

For where the defendant had bid for a lot at an auction, but before the hammer was knocked, recanted his bidding, and said he would not have the lot; notwithstanding which it was knocked down to him, and on his refusing to take it away, it was resold for a less sum than the defendant had bid, and this action was brought against him for the difference of the price. At the trial, before Lord *Kenyon*, the plaintiff was nonsuited; and on a motion for a new trial, the judge's direction was held clearly to be right. For that the assent of both parties was necessary to make the contract binding; and though the bidding was an offer, and the knocking down of the hammer a signification of the seller's assent, yet that that was not done here till the defendant had retracted. To deny the bidder a power to retract, would be to bind one party and not the other. Payne v. Cave. 3 T. Rep. 148.

6. "Where a deposit has been made, it should seem that "if the vendee does not perform the bargain, he shall forfeit "such deposit; which is the rule in equity."

For where, on a sale under a decree, a part of the purchase-money was deposited, and the vendee afterwards refusing to complete the purchase, the vendor filed his bill to compel the payment of the money and perfect the sale; the Court allowed the defendant (the vendee) to forfeit his deposit, and give up all claim to the thing intended to be purchased. Saville v. Saville. 1 P. Wms. 745.

7. It was resolved in this case, that when a person sends an article to an auction which advertises to sell to the best bidder, with orders *not to have it sold* under such a price; an action will not lie against the auctioneer if he sells it at a price less than that so mentioned, as such dealings are a fraud on buyers, who suppose the lot is to be knocked down to the best *real bidder*; but it is otherwise, had he ordered it *not to be set up* under such a price. Bexwell v. Christie. Cowp. 39

Howard v. Castle. 6 Term Rep. 642.

And it was in this case farther decided, that if the owner of goods or an estate sold by auction, *employs puffers* to bid for him without declaring it, it is a fraud on the real bidders, and the highest bidder cannot be compelled to complete the purchase made under such circumstances.

Williams v. Willington. H. Black. Rep. 81.

[17]

And note, That an auctioneer who sells goods may maintain an action for them against the buyer *in his own name*, even where the goods were sold at the proprietor's own house; for he has a possession coupled with a special property or interest, a lien for the charges of the sale, the commission, and auction duty which he is bound to pay.

Per Lord Kenyon. Hanson v. Roberdeau. S. Guild. East. 1729.

And so if an auctioneer will not give up the name of his principal, he is *personally* liable to an action on a warranty or representation respecting the thing sold, or for not completing the purchase after it had been knocked down; but if the principal is known, the action should be against *him*.

2d, The next ground of *assumpsit* on express contracts I shall consider, is that arising from

WAGERS.

Per Lord Mansfield. Cowp. 792.

"Wagers upon indifferent matters, without any interest "in the parties farther than the wager itself, are allowed "by the laws of this country, unless where they are re- "strained by particular acts of parliament."

Good v. Elliott. 3 T. Rep. 693.

As in this case, where the wager was, Whether one Susannah Tye had not bought a certain waggon of one David Coleman? After a verdict for the plaintiff, it was moved in arrest of judgment, 1st, That all wagers were void at common law, where the party has no interest in the subject, except that created by the wager. 2dly, That wagers came within stat. 14. *Geo.* 3. 48. as wagering policies; but it was resolved by the court (*dissentiente* Justice *Buller*) 1st, That an interest in the subject matter was not necessary to enable the party to maintain this action, which might be on indifferent matters. 2dly, That wagers were not within the stat. 14 *Geo.* 3. which was confined to policies of insurance and written instruments only.

Per Lord Mansfield. Cowp. 38.

"And *assumpsit* will lie to recover a wager fairly won; "but it must arise on a contingency, the event of which is "then unknown to both parties; it must not be for a blind "to an illegal or an immoral transaction, or to conceal "simony, usury, or bribery; nor must it be inconsistent "with the sound policy of the state to support it."

1. "It is essential to a fair wager *that it is contingent*, and "the event unknown to the parties at the time of laying the "wager; for if either side have a certainty of winning, the "wager is void."

As where the wager in question was between two young men on the longest life of their respective fathers. In fact, at the time when the wager was laid, the defendant's father was dead, he having died the same day on which the wager was made; but at such a distance, *that the event could not be known for some days after*. The defendant refused to pay, on the ground that it was impossible he could win, his father being *dead when the wager was made*, and so, that as he could not win, he was not bound to pay. But it was held that the event being unknown at the time when the wager was laid, that it was a fair wager; and the plaintiff had judgment for the amount of it. Lord March v. Pigot. 5 Burr. 2803.

So where the wager was, that a decree of the court of Chancery would be reversed in the lords on appeal, and the plaintiff had a verdict; it was moved to arrest the judgment on two grounds. 1st, By asserting that the wager was not fair, from the circumstance that the laws are positive and certain, and so the event not contingent. 2dly, As being illegal, as *contra bonos mores*, it being improper and disgraceful, and so against principle, to suppose that a decision would take place contrary to right; and therefore that the Court would not support it. But it was held to be contingent, the question being clearly doubtful. 2dly, That it was neither improper nor prohibited by any positive law, nor contrary to any principle of policy or morality; and the plaintiff recovered. Jones v. Randall. Cowp. 37.

2 "The ground of the wager must not be an *immoral or* "*indecent transaction*, for such cannot be recovered; nor in- "volve any question by which the peace or character of oth- "ers may be affected." Cowp. 38.

As where the wager was upon the sex of Mademoiselle *D'Eon*, the action was held not to lie. 1st, Because it afforded an opening to indecent and improper evidence. 2dly, Because the peace and character of a third person might be materially injured by an inquiry in which such person was not concerned; but by the voluntary acts of two uninterested persons was brought into question. Da Costa v. Jones. Cowp. 729.

3. "Neither must it be a cover to an *illegal transaction*, "as to conceal bribery, simony, or usury." Cowp. 38.

As where the wager was between two voters on the event of an election then depending, it was adjudged that the action would not lie; for so it might be made a means of bribery at the election. But had the persons not been voters, it might have been otherwise. Allen v. Hearn. Mich. 26. G 3. B. R. 1 Term Rep. 56.

"And *a fortiori* wherever the wager is itself illegal, or "arises from an illegal transaction, it is not recoverable. "Such are the cases of wagering policies." [19]

So

Johnson v. Bana. 4 Term Rep 1.

So where the wager was on a race, but the sum run for was under 50*l.* and so was illegal under stat. 13 *G.* 2. *c.* 19. it was resolved, that the plaintiff could not recover; for the race, which was the subject of the wager, being illegal, so also was the wager.

Such also are wagers founded on gaming, which are avoided by stat. 9. *Ann. c.* 14.

But 1st. "Under the statute the wager must arise from "*play*, or be laid on a person *playing* at some game prohib- "ited by the statute."

Lynal v. Longbothom. 2. Wils. 36.

Ximenes v. Jaques. 6 Term Rep. 499. S. P.

For where the wager was that one Clarke would not run four miles in twenty-one minutes; this was adjudged not to be within the statute; for the person by whose means the wager was won was not playing, though it was admitted that a foot-race was a game prohibited under stat. 9 *Ann.*; and that, if it had been laid and proved that Clarke was playing at a game, called a foot-race, the wager would not be recoverable: but that did not appear, as Clarke might be running for exercise or amusement, and know nothing of the wager; and so could not be said to be *playing*.

2dly, "So where the wager was not on the event of the "game played at, but on a collateral matter."

Pope v. St. Leger. Salk. 344.

As where it was, Whether one of the players was bound to move a man at backgammon, not on the play. It was adjudged to be recoverable in this action.

Brown v. Lawson. 2 H. Black. Rep. 43.

But where the wager was, How many different ways there were of nicking seven the main at the game of hazard; the Court held, that such a cause should not be entertained in court; for the game of hazard being prohibited by law, it would be admitting the discussion in a court of justice of a subject founded on an illegal transaction.

4. "So the wager must not be on a question which *it is* "*inconsistent with the sound policy* of the state to enter into "the discussion of."

Atherford v. Beard. 2 Term R. 610.

As where the wager was respecting the amount of the hop duties of Canterbury, it was adjudged that the action was not maintainable; for it made it the interest of one of the parties to diminish the public revenue, and was laying open to foreigners the internal resources of the kingdom, and drawing that into discussion which should only be canvassed in parliament. It was therefore a matter which in sound policy ought not to be brought into question.

Cotton v. Thurland. 5 Term R. 405.

5. Where a wager is laid and the money deposited in the hands of a stakeholder, though the subject-matter of the wager (as a boxing match, *ex. gr.*) be illegal, the stakeholder cannot justify holding the money from either of the parties on

on that ground. And in such case, though the battle be fought, if either party gives notice to the stake holder not to pay over the money, and brings his action before it is paid over, he can recover it.

And *Note*, That to recover a wager, *indebitatus assumpsit* will not lie, but a special *assumpsit* ; for *indeb. assumpsit* lies only where debt will.

Bovey v. Castlemain. 1 Raym. 69. Hard's Case. Salk. 23, S. P. Carth, 338. 3. Term R. 704.

* 3d, " A third ground of this action is that for

*[20]

USE AND OCCUPATION.

1. " This was given by stat. 11 *Geo.* 2. *c.* 19. which enacts " (*s.* 14.) that where the agreement is not by deed, the " landlord may recover a reasonable satisfaction for the tenements occupied by the defendant, in an action on the " case for use and occupation ; and if in evidence on the " trial any parol demise, or any agreement not by deed appears, wherein a certain rent has been reserved, the plaintiff may make use thereof as an evidence of the *quantum* " of the damages."

1. " Where there is a note in writing expressing the " *quantum* of the rent, no evidence of a parol agreement " for the payment of any greater rent than is therein expressed shall be admitted : for this would elude the statute " of frauds, if the courts would admit parol evidence to " supply or alter written evidence."

As in this case where there was a written agreement to let a lease of an house for 26*l. per ann.*, on this an action was brought for the use and occupation. The defendant paid 26*l.* into court. At the trial the plaintiff offered to give parol evidence, that besides the 26*l. per ann.* the defendant was to pay the ground landlord 2*l.* 12*s.* 6*d.* This evidence was held to be inadmissible, particularly as no evidence was offered that such payment had ever been made.

Preston v. Merceau. 2 Black. Rep. 1249.

Before this statute, rent was recoverable only by action of debt ; for at common law *assumpsit* would not lie for it.

Green v. Harrington. Hutt. 34.

2. " *Assumpsit* for use and occupation will only lie, where " the defendant holds by permission of, or by demise, from " the plaintiff."

Therefore where a tenant from year to year of an house at a yearly rent, became a bankrupt in the middle of the year, and his assignees entered and kept possession for the remainder of the year : it was held that the lessor could not maintain an action for use and occupation against *the assignees*, for the bankrupt's occupation as well as their own, without *proving their special instance and request* for the bankrupt to occupy during the time that had elapsed before the bankruptcy.

Naish v. Tatlock. 2 H. Black. 320.

" Therefore

" Therefore no action for use and occupation will lie " where possession has been adverse and tortious ; for such " excludes the idea of a *contract*, which in all cases of this " action must be express or implied."

Birch v. Wright. 1 Term R. 378.

For where the defendant was tenant from year to year to Mr. Bowes, who, in the year 1777, together with his wife had granted an annuity to the plaintiff, charged on the estate of which the defendant was tenant: Bowes received the rents till November 1784, when 81*l.* rent was in the defendant's hands ; in 1785 the plaintiff *brought an ejectment*, and recovered possession, and then gave notice to the tenant (the defendant) to attorn to him, and pay over to him the rent then in his hand. Defendant refused to attorn or pay him the rent ; upon which a writ of possession was executed, and this action brought for use and occupation, for the rent accruing from the time when the last payment was made to Bowes, to the execution of the writ of possession. When it was resolved, That the plaintiff might recover *in this form of action* for the time *before the ejectment brought*, but *not for the rent accrued after ;* for by bringing the ejectment the plaintiff had from that time considered the defendant as a trespasser, his title tortious, and so there could be no contract implied.

[21]

Girarday v. Richardson. Espin. Cas. N. P. 13.

3. " *Assumpsit* for use and occupation will not lie where the " premises have been let for an unlawful purpose." For where this action was brought to recover rent agreed on for the use and occupation of certain premises belonging to the plaintiff: it was proved that they had been let to the defendant, who was a woman of the town, by the plaintiff's wife, who managed his house ; *and that at the time of the letting she was informed of the circumstance, and expressed her acquiescence, that the defendant should be at liberty to receive visitors there for the purpose of prostitution.* Lord *Kenyon* directed a verdict for the defendant.

Atkinson v. Pierpont. Lincoln Ass. 1775. MSS.

4. Tenant at will demised over to another. It was held by *Dennison*, Justice, That *he* might maintain an action for use and occupation ; that however the law might be between the original landlord and the first tenant, yet that there was a contract between the tenant at will and the defendant: and as the defendant had enjoyed the benefit of the contract, he thought the action was clearly maintainable.

" So that it seems to be a general rule, that, as this action " is founded on a contract, wherever the defendant *enjoys by* " *permission of or demise from the plaintiff*, he shall be liable " in this action, and shall not be allowed to question the " plaintiff's title."

Morgan v. Ambrose. Monmouth Lent Ass. 1759. MSS.

For where in an action for use and occupation, the plaintiff gave evidence of payment of rent by the defendant for 19 years, the defendant would have gone into evidence to prove a title in another. Per *Wilmot*, Justice. Payment of rent.

rent, and holding under a person, for so long a time, is conclusive evidence against the defendant; and he cannot set up a title in another. And as to the objection that has been made, that the defendant may be liable to two actions for the rent, by the persons having different titles, that cannot be the case; for though another has title, yet he cannot bring an action for the rent till he has made an entry, and recovered in ejectment; and then it must be trespass for the mesne profits.

But he agreed, that though the defendant could not controvert the title, yet that he might give evidence to explain the holding under him, as that he was executor during the minority of A. B. and that his interest was then determined: for that admits the plaintiff's title, during the time the defendant held under him. S. C.

So where in *assumpsit* for use and occupation of glebe by the incumbent against the tenant, to whom the glebe lands had been let by a former incumbent, and who had paid rent to the present, it was held, that the defendant in this action could not controvert the plaintiff's title by shewing that he had been simonically presented. Cook, clerk, v. Loxley. 5 Term Rep. 4.

5. "In order to entitle a party to maintain this action, "the occupation must be such as the party contracted for, "with a view to its being for his benefit."

For where the plaintiffs contracted to sell their interest in a wharf to the defendant, and stated that the lease had 13 years to run; upon this contract the defendant entered into the possession of the wharf, but it being discovered that the plaintiffs had but three years, the defendant refused to complete the purchase. It appeared that the defendant had been put to considerable expense in removing timber to it. The plaintiffs brought *assumpsit* for the use and occupation, when it was ruled by Lord *Kenyon*, that the action was not maintainable; inasmuch as the occupation had not been beneficial to the defendant, but on the contrary had been injurious, as in case he had known that the plaintiffs had only three years, he would probably not have taken the premises. Hearn v. Tomlin. Peake N. P. C. 192.

6. By *s.* 15. same statute, "It is enacted, That if any "tenant for life dies before or on the day on which any "rent was made payable, upon any lease which determined "with the life of such tenant for life, his executors or administrators may in this action recover against the under- "tenants such a rateable part of such rent, as would be due "to the tenant for life for the time he lived." [22]

In Chancery, Lord *Hardwicke* decided, that when *tenant in tail* made a lease for years and died a week before the rent became due, *without issue*, that his executor was entitled to an apportionment of the rent; for though tenant for life only Paget v. Gee. 1 Burn's J. 551. Ambler 198.

only is mentioned, yet he as to this is a tenant for life. In the same case Lord *Hardwicke* was of opinion, that tenant for years determinable on lives, was within the mischief of the statute. So where a wife had an annuity as a separate maintenance, payable quarterly, and died in the middle of the quarter, the annuity it was held should be apportioned, though annuities are not within the statute.

Howell v. Hanforth. 2 Black. Rep. 1016.

4th. The next class of Express Contracts, which are the foundation of this action, arise on

BILLS OF EXCHANGE AND PROMISSORY NOTES.

Under this head I shall consider, 1. Those points in which Bills of Exchange and Promissory Notes agree: 2dly, In what they differ.

1st. Bills of Exchange and Promissory Notes agree, 1st, in their being negotiable when drawn in a particular form. 2dly, In the *mode* in which they are negotiable. 3dly, They differ in this, that in the case of Bills of Exchange, the forms of acceptance and protest are necessary; which in cases of notes are not required.

These form the following heads:

1. What Bills or Notes are of a negotiable nature. 2. In what manner negotiated. 3. The acceptance of Bills of Exchange. 4. The protest. 5. The nature of payments by Bills or Notes.

1. Of what Bills or Notes are of a negotiable Nature.

1. *What Notes are of a negotiable Nature.*

Pottet v. Pearson. Salk. 129.

Bills of exchange drawn in the usual form, of being *payable to A. B. or order*, were at all times negotiable by the custom of merchants; but promissory notes were first made so by stat. 3 & 4 *Ann. c.* 9 *s.* 1. which enacts, "That all notes "signed by any person, or by any body, politic or corporate, "or by any person intrusted by them to sign such notes, "promising to pay to any other person, or order or bearer, "the money mentioned in such note shall be assignable over "by indorsement as inland bills of exchange are; and the "indorsee may maintain his action on such indorsement."

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Taylor v. Dobbins. 1 Stra. 399.

1. It is sufficient, if the note is drawn in the maker's hand-writing, thus: "I, *A. B. promise to pay*," (or his name be written by him, in any part of it,) &c. without being *subscribed A. B.* though the words of the statute are *signed* by such person: for the statute does not direct the name to be in any particular part, or subscribed in any particular manner.

Vid. 2L. Raym. 1376.

2. "No promissory notes are negotiable, but such as are "for the payment of money *absolutely*. For if they depend "on a contingency, they are not negotiable."

As

As where the note was, "I promise to pay *l.*—— on the death of George Henshaw, if he leaves me so much, or I am otherwise able." It was adjudged, that this note was not a negotiable one within the statute; for it was for the payment of money on the contingency of George Henshaw leaving the person so much money, or that he would otherwise be able, neither of which might happen. 1 Burr. 323. Roberts v. Peak.

So where the note was a promise to pay *l.*—— *after the defendant's marriage*, it was held not to be a negotiable note; for the defendant might never marry, and so the note was contingent. Beardsley v. Baldwin. 2 Stra. 1151.

Therefore notes *in the alternative* are not negotiable, as a note promising to pay or deliver an horse, or to pay if *J. S.* does not, are not negotiable notes; for the note becomes a nullity by performance of the other part of the alternative. Smith v. Boheme. 2 L. Ray. 1396.

"But where notes are to become payable on an *event* "*which will certainly happen*, and take effect in future, they "are then negotiable."

As where the note was for the payment of money *six weeks after the death of the defendant's father*, it was held to be a good negotiable note, for the event was certain, and the uncertainty only went to the time of payment, which did not destroy its negotiable nature; for such is the nature of all notes payable after sight. Cooke v. Colcham. 2 Stra. 1217.

"As in the cases already cited, of notes payable on the "death of any person, which, though uncertain as to the time "when they would become payable, that depending on the "time of the person's death, were yet negotiable where the "promissory note was to pay, upon the receipt of the mak-"er's wages and prize-money from his Majesty's ship Suf-"folk;" this was adjudged to be a good and negotiable note, as the paying of a ship was a thing certain, though the time when it would take place was uncertain. Evans v. Underwood. 1 Wil. 262. Andrews v. Franklin. 1 Stra. 24 S. P.

*[24]

"And so a note at first contingent may, by subsequent "words, become positive and negotiable;" as, if a note was drawn by an infant, promising to pay "*when he comes of* "*age*," that would not be negotiable, on account of the uncertainty of the event; but when it is added, "on his "coming of age," *viz.* "12th *June* 1750," there the time is specified, and it becomes a certain debt *solvendum in futuro*. Goss v. Nelson. 1 Burr. 226.

3. "Notes, in order to be negotiable, must be for the "*payment of money only.*"

For where the note was "to deliver up horses and a "wharf, and to pay money at a particular day;" it was adjudged to be not a note negotiable within the statute, not being for the payment of money only. Martyn v. Chauntry. 2 Stra. 1271.

More v. Vanlute. E. 1 Geo. 1 C. B. Bull. N. P. 272.

So a promise to pay 300*l* to *B.* or order, *in three good East India Bonds*, was held to be not a negotiable note within the statute.

4. "No express form of words is necessary to constitute "a good and negotiable note, provided it amounts to an "absolute promise to pay."

Morris v. Lee. 1 Stra. 629.

As a note promising *to be accountable to J. S.* or order, value received, or for the debt of another, (1 *Stra.* 264.) is negotiable.

Chadwicke v. Allen. 1 Stra. 706.

So *acknowledging to have received* certain notes, and to *be indebted* in the balance, which the maker of the note promises to pay, is a good and negotiable note.

Smith. v. Kendal. 6 Term Rep. 123.

A note payable to *A. B.* without the words, "or order," is a promissory note within the statute.

"And where a note contains a promise to pay absolutely, "it is not necessary to add for *value received.*"

Popplewell v. Wilson. 1 Stra. 264.

For where in error from *C. B.* in case on a promissory note, whereby the defendant promised to pay to the plaintiff ——*l.* for a debt due by *A. B.* to the plaintiff, it was objected, That this not being for value received was not within the statute, and, *prima facie*, the debt of another is no consideration to raise a promise; but the court held it to be within the statute, being an absolute promise, and every way as negotiable, as if it had been generally for value received.

2. *What Bills of Exchange are of a negotiable Nature.*

[25]

1. "*Bills of exchange* must be drawn for the *payment of money absolutely*, in order to be negotiable; that is, they must "not be confined to credit on any particular thing or fund, "or depend for payment on any particular event or contingency."

Jenny v. Herle. 1 Stra. 591. Carlos v. Fancourt. 5 Term R. 482. S. P.

For where the bill of exchange was drawn "on the monies in the drawee's hands belonging to the proprietors of the Devonshire mines, being part of the consideration money for the purchase of the manor of *West Buckland*;" this was held to be not a negotiable bill of exchange; for it was *charged on a particular fund* which might not answer, and so the bill was not payable at all events.

Dawkes v. Ld. Deloraine. 3 Wils. 208.

So where the bill was drawn thus: *Pay to M. R. 32l. out of William Stewart's money, as soon as received;* this was adjudged not to be a negotiable bill of exchange, on account of the uncertainty of the fund on which it was drawn.

Jocelyn v. Laseree. 1 Stra. 591.

So where the bill was drawn by an officer on his agent, *on his growing subsistence*, it was adjudged not negotiable for the same reason.

"For

"For it is essential to a bill of exchange, that it shall de- Per De Grey. C. J. in Dawkes v. Ld. Deloraine. 3 Will. 207.
"pend on the *personal credit* of the parties, whose names "are on the bill independent of any fund, event, or con- "tingency; for in order to charge them they must be *per-* "*sonally liable*; but when the bill is drawn on any fund, the "fund is the debtor, not the person; so when drawn on "any contingency, the person is not liable till the contin- "gency happens. So that it becomes necessary to ascertain "what are properly bills of exchange, and what not; as if "the bill is not a negotiable one, the party is not liable to "an action on it." Therefore, in the case of Dawkes *v.* Lord Deloraine, *supra*, which was against the defendant, as drawer of the bill therein mentioned, he was adjudged not to be liable: for having charged the bill on the money of William Stewart when it was received, he did not mean to make himself liable, and he had judgment accordingly.

"But where a particular fund is mentioned, *if that is one* M'Leod v. Snee. 2 Stra. 762.
"*that is certain*, and the party is still liable personally beside, "in that case, the bill is negotiable which is drawn on its "credit."

As where it was drawn by an officer in these words: "Pay to *A. B.* or order, ——*l.*, as my *quarterly half-pay*, to be due from the 24th of *June* to the 24th *September*, by advance." This was held to be a good bill of exchange: for the half-pay was a certain fund, and it was only a direction to the drawee out of what fund he was to be reimbursed; but the money was to be advanced on the credit of the person. [26]

"But where a bill is so drawn on a particular fund, though "not regularly a bill of exchange to charge the parties per- "sonally, it shall operate as an assignment of so much, and "bind."

For where Debiray, an officer, drew a bill of exchange on the agent of the regiment, "Please to pay to *A. B.* the sum of ——*l*, out of the first money that becomes due to me on account of arrears, or non-effective money;" the defendant did not accept the bill, but marked it in his book, and promised to pay it when effects came to his hands. Debiray died before the bill became due. It was allowed on all hands, that this was not a bill of exchange according to the custom of merchants, being to be paid out of a particular fund; but Lord *Mansfield* said, it was an assignment for a valuable consideration, with notice to the agent, and he was bound to pay it. He said, the agent is the known public officer for the regiment, and that the administrator could not prevent the money from coming to his hands; and that he remembered a case in chancery, where the agent (under the like circumstances) had paid the money to an administrator, and he was decreed to pay it over again to the person in whose favour it was drawn; and so this being an action by the Clark v. Adair. Sit. East 4 G. 3. MSS. cited by Buller J. in Master v. Miller. 4 Term R. 320.

the administratrix of Debiray, to recover the money to the amount of which the bill had been drawn, it was ruled, That the holder of the bill had a title to the money; and the defendant had a verdict.

3 Wils. 211.

2. "In order to make bills of exchange negotiable, they "must be *payable to order or bearer*. For if a bill is payable "to a person only by name, it is not negotiable, as by the "terms of it, it is confined to such person only."

"So if a bill of exchange is drawn for a particular pur- "pose, or is directed to be applied to a particular use, such "bill of exchange is not negotiable, and that whether the "direction is in the body of the bill or by indorsement."

Ancher v. Bank of England. Doug. 615.

For where one Dahl, a Dane, resident in Denmark, being indebted to the house of Heide and Co. of London, applied to one Mestue to get him a bill on London, in order to discharge the debt, Mestue procured him a bill to the amount of the debt from the plaintiffs, on Heide and Co. This bill was a regular bill of exchange, and payable to Mestue or order; Mestue remitted the bill to London, with this indorsement: "*The within bill to be credited to Dahl, value in "account*;" and the letter in which it was inclosed informed the house of Heide, that it was to be applied to the discharge of the debt due to them by Dahl. The bill was received, and notice given by Heide and Co. that it should be so applied. Afterwards a clerk in the house of Heide forged an indorsement on this bill, and got it discounted at the Bank of England. When the day of payment came, the acceptors having become insolvent, and the clerk absconded, one Fulgbergh paid it for the honour of the plaintiffs (the drawers): and this action was brought to recover back its amount: when it was resolved, that by the special indorsement, the bill, though originally negotiable, ceased to be so; so that not being negotiable farther than to Heide and Co. the Bank of England had paid the money in their own wrong, and, the plaintiffs had judgment.

[27]

3. "It seems to have been formerly thought necessary "that bills of exchange, in order to be negotiable, should "express to be *for value received*."

Banbury v. Lisset. 1 Stra. 1212.

For where the bill was in these words, "Pay to Mr. Richard Banbury, two hundred pounds, on account of the freight of the Vale Galley, and this shall be your sufficient discharge;" the defendants accepted the bill specially. On being sued on this acceptance, it was adjudged not to be a bill of exchange, as wanting the words *value received*.

White v. Ludwich. Bailey on Bills of Exch. 72.

But however, it has been since settled on demurrer, that it is not necessary that the bill of exchange should import to be for *value received*.

These

These cases apply to the particular nature of promissory notes and bills of exchange. In the following, neither are negotiable, as being void at law in their creation; neither can they by any future negotiability be made valid, even in the hands of a *bona fide* holder.

1. If made by a *feme covert*.

For where a woman *during coverture* gave a note of hand for a sum of money, it was adjudged to be void: and though in this case *after her husband's death she promised to pay it*, it was held not to establish the note, which was void in its creation. Lloyd *v.* Lee. 1 Stra. 94.

2. If given for an *usurious consideration*.

For where the defendant having occasion to borrow two hundred pounds; two persons, of the names of Harris and Stretton, agreed to lend it: but pretending not to have the money, prevailed on him to *take goods*, which they valued at two hundred pounds, and for which he accepted the bill of exchange in question in their favour. These goods, when they were sold, produced but 117*l*. The bill of exchange was indorsed over to the plaintiff fairly, and for a valuable consideration; and he having sued the defendant on it, it was resolved, That the pretended sale of goods was to give a colour to the parties to take more than legal interest, and so was usurious. 2dly, That the bill, being given in consideration of this usurious contract, was absolutely void (under stat. 12 *Ann.* 16.) even in the hands of a fair indorsee; and the defendant had judgment. Lowe v. Walker. Doug. 708. Massa. v. Dauling. 2 Stra. 1243. S. P. [28]

But if it has been given for a *bona fide* consideration, usury in any of the intermediate transactions shall not avoid it in the hand of a *bona fide* indorsee in an action against the acceptor. Daniel v. Cartony. Espin. N. P. C. 274.

3. If given for money *won at gaming, or lent to game with*.

As where in an action by the indorsee of a promissory note, it appeared that it was given by the defendant *for money lent* to him *knowingly to game with*, by one *Church*, who had indorsed it over to the plaintiff for a valuable consideration, it was held, that stat. 9 *Ann.* 14. having declared all notes, whereof the whole, or any part of the consideration, was money knowingly lent to game with, to be void to all intents and purposes whatever; and this note being of that description, it could never be recovered in any hands whatever. Bowyer v. Brampton. 2 Stra. 1155.

4. By stat. 15 *Geo.* 3. 51. "All negotiable promissory "notes, or inland bills of exchange, for a less sum than "twenty shillings, are declared to be null and void, and "persons issuing them liable to a penalty of 20*l*."

And by stat. 17 *Geo.* 3. *c.* 30. it is further enacted, "That "all promissory notes, bills of exchange, or draughts, being "negotiable, to the amount of twenty shillings or upwards, "and

" and less than 5*l.* or for 5*l.*, shall specify the names and " places of abode of the person to whom or to whose order " they shall be payable, bear date at or before the time when " they are issued, and be made payable within twenty-one " days after date, shall not be transferable after the time " limited for payment, and if indorsed, the time must be " mentioned, and the name and place of abode, and signing, " attested by witnesses."

Vide Bowman v. Nicholl. 5 Term R. 537.

5. " Any alteration in a bill of exchange in a material " part, shall make it void in the hands even of a fair holder " for a valuable consideration."

Master v. Miller. 4 Term Rep. 320.

As where a bill was drawn on the defendant dated the 26th of March, three months after date, and accepted by him; but while in the hands of the payee the upper part of the figure of 6 was erased, and it stood as dated the 20th. In this form it was indorsed to the plaintiff, who sued the acceptors; when it was resolved, That he could not recover; for by this alteration the time of payment was accelerated and materially changed, and by such means the instrument avoided.

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Smith v. Boehm. Gilb. Rep. 93. 2 Lord Raym. 1396. S. C.

Note, It is necessary to attend to what notes are negotiable, and what not; for if the plaintiff declares as indorsee on a note of hand under stat. 3 and 4 *Ann. ch.* 9. and has judgment, and it afterward appears that the note was not negotiable, judgment will be arrested.

1. In what manner Bills of Exchange or Promissory Notes are negotiated.

This is either by indorsement or without it, that is merely by delivery.

1st. When a promissory note, or bill of exchange, is of a negotiable nature, it then only can be indorsed over to a third person; I shall therefore consider the decided cases as to indorsements under the following heads: 1. Who may indorse a bill of exchange, or promissory note. 2. In what manner an indorsement should be made. 3. The effect of the indorsement. 4. The manner and order in which the several parties are chargeable.

1. *Who may indorse Bills of Exchange, or Promissory Notes.*

1. The payee of a bill of Exchange, or the person to whom the note is payable, must, from the nature of the transaction, be the first indorser.

Conner v. Martyn. 1 Stra. 516. 3 Wils. 5.

2. If a note is made to a *feme covert*, she cannot indorse it; for the right is vested in the husband, and *he alone can indorse it*. So if it was made to her when sole, it is the same,

same, for if she afterwards marries, the *husband must indorse the note*; for being personal property, it belongs exclusively to the husband.

3. So by the custom of merchants, *an executor or administrator may indorse over a note or bill of exchange*: for the whole property is in them, and the note or bill is in its nature assignable.

Robinson v. Stone. 3 Wils. 1 2 Stra. 1260. S. C.

So a bill of exchange may be indorsed *to* an executor or administrator as such, and be sued for by such executor or administrator: as in payment of a debt due to the estate of a testator or intestate.

King v. Thorn. Mic. 27. G. 5. B. R. 1 Term Rep. 487.

4. "If a note or bill of exchange is made payable to two "persons, *both should indorse it*, unless they are partners; in "which case one may indorse in the partnership name."

*For where the bill in question was drawn by two persons of the name of *Maydwell* payable to their own order, they were not partners, and *one of them only indorsed it* to the plaintiff. In an action against the defendant (the acceptor) Lord *Mansfield* nonsuited the plaintiff, holding that *both names*, to whom the bill was payable, should have been indorsed. On a motion for a new trial, the Court were of opinion, That as to this transaction, by making the bill in that form, "*Pay to us or our order*," they had made themselves so far partners, that the indorsement by one was sufficient. A new trial was therefore granted. At the second trial the counsel for the defendant offered evidence, That it was the usage and understanding of all the merchants and brokers in *London* that the indorsement should be made by both payees: the admission of this evidence was opposed, but Lord *Mansfield* did not think the question so settled as to preclude the evidence offered; it was therefore admitted, and there was a verdict for the *defendant*.

Carvick v. Vickery. Dougl. 653. *[30]

5. "Where a bill of exchange has been delivered for a "valuable consideration before a party becomes bankrupt, "he may indorse it afterwards."

In this case *Hill* and *Richardson*, being partners and indebted to the plaintiffs, drew a bill of exchange, payable to their own order on one *Pickering*; and in part payment of the debt so due to the plaintiffs, delivered to them this bill; but at that time forgot to indorse it, and the mistake was not observed at the time by the plaintiffs. *Pickering* accepted the bill in the hands of the plaintiffs, and promised payment; but before he had paid it, *Hill* and *Richardson* became bankrupts, and the omission of the indorsement being discovered, the plaintiffs applied to them, and *they indorsed the bill after they had become bankrupts*. An action being brought against the acceptor, it was objected, That this action could not be maintained, the plaintiffs deriving their title by indorsement from the bankrupts: but it was ruled by Lord *Kenyon*,

Smith & al. v. Pickering. Sitt. West. Hall, 31 G. 3 & Pasch. 31 G. 3 B. R. MSS.

Kenyon, That the plaintiffs having taken the bills for a valuable consideration, obtained thereby a complete property; and that the indorsement was merely the formal part, (the evidence of the transfer,) and so might be made by the parties after they became bankrupts. On a motion for a new trial, the Court of *K. B.* concurred in the judge's opinion.

2. In what manner the Indorsement is to be made.

1. "The usual mode of indorsing a note or bill is by these "words, *Pay the contents to A. B.*, and signed by the payee: "and such indorsement transfers the property to *A. B.* So "also may a bill or note be indorsed by a *blank indorsement* "*of the name alone*; but unless there is some evidence that it "is taken by the indorsee as property, the mere indorse-"ment of the name does not *of itself* transfer the property "in the bill or note out of the payee, or indorser."

Clark v. Pigot. 1 Salk. 126.

As where the plaintiff having a bill of exchange payable to him or order, on the defendant, sent it to his friend *J. S.* to get it accepted, having first put his name on it; *J. S.* got it accepted; but it not being paid, the plaintiff brought his action against the defendant; it was contended that it would not lie, the property being transferred by the indorsement to *J. S.* But *Holt*, Ch. J. held, That *J. S.* had it in his power to act either as indorsee of the bill, by writing to that effect above the plaintiff's name, or as his servant, by writing an acquittance to the defendant above it, in like manner: that not having written an indorsement above, he took the note to receive the money as servant to the plaintiff, and so the action well lay.

Lucas v. Haynes. Salk. 130. S. P.

Theed v. Lovell. 2 Stra. 1103.

And therefore where in the action by the payee, the note being produced, had his name on the back of it; and it was insisted, that *that* was an indorsement. The judge allowed it to be struck out in court; for being in blank, no property was transferred.

Hawkins v. Cardy. 1 Ld. Ray. 360. Salk. 65. S. C.

2. A bill of exchange cannot be indorsed over *for a part of the sum it is drawn for*, for that would subject the drawer or acceptor to several actions, upon a contract which is entire. But the holder may have his action for part, if he acknowledge satisfaction for the rest.

Wiffen v. Roberts. Espin. N. P. C. 261.

So the indorsee of an *accommodation* bill who takes it knowing it to be such, and advances on it but part of the amount, can only recover as much as he has really paid; but where the bill has been regularly drawn in the course of trade on a fair account, though the indorsee has not given the indorser the full amount of the bill, yet he may recover the whole, and be the holder of the overplus above the sum he has really paid to the use of the indorser.

Johnson v. Kenyon. 2 Wils. 262.

Though the indorsee has received part of the money *from the indorser* of a bill of exchange, he may, nevertheless, have his

his action *against the drawer of* the bill *for the whole amount of it*, and the indorser have his remedy, for so much as he has paid, against the indorsee; for if the action was brought by the indorsee only for the residue, the indorser who paid him would have his action against the drawer for the part he had paid, and so multiply actions.

But if the indorsee of a bill of exchange receives part of the money from the drawer, *he can only recover the residue from the acceptor*; for a bill of exchange being an order from the drawer to the acceptor to pay so much money, when the drawer pays part, it operates as a countermand of the payment of so much of the money, and a release to the drawee. Therefore, where the plaintiff declared as indorsee of a bill for 95*l.* against the defendant as acceptor, the drawer had paid 60*l.* and the acceptor now *paid the remainder into court*, the defendant had a verdict, Lord *Loughborough* holding the above doctrine; which was confirmed by the court of C. P. Bacon v. Searles, H. Blackst. Rep. 88.

And the reason of the difference of the two cases seems to be, That as the bill was created by the drawer in consideration of the amount first advanced by the payee, or as payment of a debt to payee, and he is *ultimately liable*, he shall be allowed to discharge the bill in any manner he pleases: but as payment must ultimately come from him, to allow a partial payment by any other party whose name was on the bill, would be to multiply actions. [32]

4. "If a bill of exchange or promissory note is drawn "payable to any person or order, and is not paid, *but is* "*taken up by the drawer*, such bill can never regularly "after be indorsed, it is *functus officio*, and no longer ne- "gotiable."

For where in an action against the defendant as acceptor of a bill of exchange, it appeared to have been drawn originally by one *Brown* in favour of *Hodgson*, on the defendant, who accepted it; but not being paid when due, *Hodgson* returned it to *Brown*, who paid the money. Afterwards *Brown* indorsed it to the plaintiff, who sued the defendant; when it was resolved, That the acceptor was discharged by *Brown* taking up the bill, by which there was an end of its negotiability. Beck v. Robley, H. Blackst. Rep. 89.

"Though the rule is laid down thus generally in this "case, yet it must be taken with some qualification; for "the rule seems rather to be, that where a bill or note is "indorsed after it is due, as that is a suspicious circum- "stance, it is incumbent on the party who receives it, "to satisfy himself that it is a good one, as otherwise "he shall be presumed to take it only on the credit of the "person from whom he received it. And therefore if the "indorsee of a bill or note, so indorsed after it is due, sue Plenius 3 Term Rep. 82.

"the acceptor of the bill, or maker of the note, the de-
"fendant shall be allowed to go into every circumstance of
"defence he might have had against the original party to
"whom it was payable."

Brown v. Davis. 3 Term Rep. 80. Taylor v. Mather. F. 27 Geo. 3.

Therefore where the defendant was the maker of a promissory note, payable to one Sandal or order, and he had indorsed it to one Taddy, who had noted it for non payment, and afterwards the defendant paid Sandal, but neglected to take up the note. Sandal having paid Taddy, got the note again, and passed it to the plaintiff long after it was due, who now brought his action against the defendant. It was resolved, That the defendant should have been admitted to give evidence of those facts; that the noting was a strong circumstance of fraud, and that slight evidence should weigh with the jury to presume that the indorsee was acquainted with the fraud.

Ancher v. Bank of Eng. ante. *[33]

*So a bill at first negotiable, may, by the indorsement of the payee, be restrained from being further negotiable.

5. By stat. 17 *Geo.* 3. 30. All indorsements of promissory notes or bills of exchange, under 5*l.* drawn pursuant to the directions of the statute (*ante*, fol. 28.) must be indorsed by the words "Pay the contents to *A. B.* or order," or such shall be void.

3. *Of the Effect of the Indorsement.*

1. "The indorsement always follows the nature of the "bill or note so indorsed."

Edie v. East Ind. Company. 2 Burr. 1216. 1 Black. Rep. 295. S. C.

As where the bill was drawn by *R. Clive*, payable to *Campbell or order*, and indorsed by him to *Ogilby*, omitting the words *or order*, who indorsed it to the plaintiff, it was adjudged that the bill was further negotiable, and not confined to *Ogilby*, to whom it was indorsed by name only, though these words *or order* were wanting, for that the indorsement followed the nature of the original bill, which was negotiable; that therefore the plaintiff might recover as indorsee of *Ogilby*.

Acheson v. Fountain. 1 Stra. 557. More v. Manning. Com. 312.

So where the plaintiff declared on a bill of exchange, indorsed *to him or order*, and on producing the bill, the words *or order* in the indorsement were wanting, it was adjudged to be no variance, for the bill being drawn originally payable in that form, the want of those words in the indorsement did not alter its nature, but it remained negotiable in the same form still.

"So an indorsement may be made *to a person's order only*, "and such shall be good as an indorsement to the person "himself."

For

For where a bill of exchange was indorsed thus, by the payee, "Pay the contents *to the order* of Mr. *Fisher*," and he brought his action as indorsee, to which there was a demurrer for cause, that the indorsement not being *to himself in person*, that he could not bring the action; but it was over-ruled, as this was the usual form among merchants, and an indorsement to his order transferred the property to himself.

Fisher v. Pomfret. Carth. 402.

2. The indorser of a bill of exchange may charge himself with terms different from the tenor of the bill as at first drawn, for he is as a new drawer, and may be declared against as assuming to pay according to the terms of the *indorsement*, which would be bad against the drawer: as if a bill be payable *the first of May*, he can indorse it as payable *the first of April*, and he is chargeable by such indorsement.

Swallwood v. Vernon. 1 Stra. 478.

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But where a bill at first negotiable is indorsed by the payee generally, no subsequent indorser can, by any special indorsement, restrain its general negotiability.

Smith v. Clarke, Espin. N. P. C. 180. Vid. Ancher v. Bank of England. Dougl. 615. & ante 26.

3. If a person puts his name on the back of a blank piece of paper, which is to be afterwards filled up into the form of a note or bill, the person so putting his name shall be bound as an indorser of such note or bill when made, to the amount of it: for the indorsement on such a blank piece of paper is a letter of credit to an indefinite sum, and shall bind the person who so lent his name, to the full extent of the sum for which the bill is afterwards drawn.

Russell v. Longstaffe. Dougl. 496.

4. *Of the Manner and Order the several Parties are chargeable after Indorsement.*

1. "The holder of a bill of exchange or promissory note, "has a claim against all the parties, whose names are on "the bill as drawer, acceptor, maker, or indorser; and "against each of these he may have his remedy, till he is "satisfied the whole amount. Neither is he precluded by "having sued one of the parties, from suing any of the "others in like manner."

For where a bill of exchange came to the hands of the plaintiff, with two indorsements on it of the names of Boon and Sheridan; the plaintiff sued Boon, and *took him in execution*, and afterwards let him out on a letter of licence, and then brought his action against Sheridan. It was contended for *him*, that the debt was satisfied by the imprisonment of Boon; but it was resolved, That a bill-holder had a right to sue all the parties, and that each was liable independent of the others, and though the discharging of Boon out of custody might operate to discharge him, yet that the remedy still remained in force against every other indorser.

Hayling v. Mullhall. 2 Black. Rep. 1235.

And

Mertens v. Winnington. Espin. N. P. C. 112.

And so it was ruled by Lord *Kenyon*, that if a person takes up a bill of exchange *for the honour of any of the parties* whose name is on the bill, he becomes thereby as indorsee of the bill, and is intitled to all remedies against those whose names are on it.

"Though if the holder sues two parties on the bill, if "he is satisfied by the execution against or payment by one, "he cannot proceed against the other."

Windham v. Wather. 1 Stra. 515.

For where he had sued the maker and the indorser of a promissory note in two actions, and recovered against both, it was now moved and ordered by the court, that on payment of principal and interest, and the costs in both actions, no execution should be taken out; and the court said that, had the plaintiff taken out execution on both actions, they would have punished him.

3 Burr. 674.

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2. In bills of exchange, *the acceptor is first liable*, for he is charged by the acceptance, and the drawer only comes in aid of his default. Wherever therefore a bill of exchange is indorsed, the indorsee must *first apply to the acceptor*. On default of the acceptor then recourse may be had to the drawer, but in the case of an indorsement, every indorser is as to his subsequent indorsee a new drawer, and may be sued on default made by the acceptor, without applying to the drawer.

Bromley v. Frazer. 1 Stra. 441. Lake v. Hayes. 1 Atk. 281. Heylin v. Adamson. 3 Burr. 669. Rushton v. Aspinal. Dougl. 654.

For the indorsee of a bill of exchange, on default of the acceptor, *may sue the indorser*, and is *not obliged to shew any demand on the drawer*, either in the case of an inland or foreign bill of exchange; for the indorsee may not know where he is to be found, and every indorser is as to him a drawer.

In every action therefore by an indorsee against an indorser, or drawer of a bill of exchange, *he must set out a demand first made on the acceptor*, and a default by him; and 2dly, *Notice to this effect* to the drawer or indorser, or it is error.

Dagglish v. Weatherby. 2 Black. Rep. 747.

For no action can be maintained against the drawer or indorser of a bill of exchange, till notice of the refusal, absconding, or insolvency of the drawee, he being first liable. And where the holder so sues the drawer, without setting out and proving such notice, he shall be nonsuited.

2 Burr. 674.

3. The law of promissory notes is in strict analogy to this. Promissory notes assume the shape of bills of exchange only *when indorsed*, for then *the maker of the note is the first liable*, and is as the acceptor of a bill of exchange: the indorsee as the payee, and the indorser as the drawer.

Syderbottom v. Smith. 1 Stra. 649. Harry v. Perrit. Salk. 133. S. P.

The obvious result therefore of this is, that according to the rule above, the indorsee must first make his demand against the *maker of the note*, and on his default only, have recourse to the indorser.

Therefore,

Therefore, in an action by the indorsee against the indorser, he must prove notice to the indorser of the maker's default: but proof that the maker could not be found will excuse such notice, unless the indorser shews *that the maker could be found.* Tryby v. De la Fountaine. M. 2 G. 2. per Raym. Bull. N. P. 273.

"The indorsee must shew, also, that he *used due diligence* "to make the demand from the maker of the note; and such "demand, if it can be made, shall not be dispensed with."

For where the indorsee proved *that the maker of the note,* which was due 27th of *December, had in the November before shut up house and gone away,* this was held not of itself sufficient to make a demand unnecessary, but that the indorsee should have made further enquiries, and attempted to have found him out. Collins v. Butler. 2 Stra. 1087.

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So it has been frequently ruled by Lord *Mansfield,* that it is no excuse for not demanding payment from the maker of a promissory note or acceptor of a bill, and not giving notice of the non-payment, that the maker of the note, or the acceptor of a bill of exchange, *had become a bankrupt;* as many means might remain of payment, as by the assistance of friends or otherwise. Arg. Doug. 497.

But the indorser may supercede the necessity of such a demand on the maker of the note by his own act, as if he pays part of the note; for that subjects him to the whole, and in such case a demand from the maker of the note was held to be unnecessary. Vaughan v. Fuller. 2 Stra. 1246.

And as to what shall be due diligence and proper notice, it was decided, That where the plaintiffs were bankers, and one Sharp made a promissory note payable to Wilkinson, who indorsed it to Judge the defendant; he indorsed it to Saunders and Co., and they to the plaintiffs; the note was made payable at the banking-house of the plaintiffs by Sharp the maker, who kept cash there. Some time before the note had become due, Sharp had absconded; however, on the note's becoming due, the plaintiffs wrote to his supposed place of abode, but the letters were returned, and no actual demand was made on him, as he could not be found; and on the day the note became due, notice was given to Judge the defendant; it was held, that the circumstances of the plaintiffs being the bankers of Sharp, the maker of the note, and having used the means they did, were sufficient to entitle them to recover from the defendant, the indorsee. Saunderson v. Judge. 2 H. Black. 509.

It was further held, that where a note is made payable at a particular house, a *demand at the house* is sufficient; and that notice by letter of the non-payment was sufficient. S. C.

So where the indorsee sued the maker of the note, and *his bail paid the money,* it was adjudged that the indorser was clearly discharged, for it was the same as if paid by the drawer himself. Hull v. Pitsfield. 1 Wils. 46.

4. As

Lambert v. Pack. Salk. 127, 1 Res.

4. As every indorser of a bill of exchange is therefore as a drawer in respect to the indorsee, if the action is brought by the indorsee *against the indorser*, he is *never called on to prove the hand-writing of the drawer ;* for the indorser is liable on his own indorsement though the bill was forged.

Smith v. Chester. 1 Term R. 654.

But if the indorsee brings an action *against the acceptor* of a bill of exchange, he must *prove the hand-writing of the first indorser*, even though there were several indorsements on it when accepted, for a bill of exchange is no payment to the person in whose favour it is drawn, unless it has been indorsed by him ; and it is necessary to prove that he put it into circulation, by proving his hand-writing.

" Therefore if the name of the first indorser is forged, or " cannot be proved, the holder cannot recover."

As in the case of Cheap v. Harley, *ante* 5. where the payee's name being forged, the acceptor was compelled to pay the bill over again.

Mead v. Young. 4 Term Rep. 28.

So where in an action by the indorsee against the acceptor, the case was, that the bill was drawn at Dunkirk, by one Christian, on the defendant in London, payable " to Henry " Davis or order," this was inclosed in a letter from Christian, and got into the hands of a Henry Davis, but not the person in whose favour it was intended to have been drawn. The defendant accepted the bill, and being applied to by the plaintiff, with whom Davis had discounted it, he acknowledged his acceptance, but afterwards discovering the fraud, he refused to pay it ; on action brought against him, it was resolved, that the defendant should have been allowed to have gone into evidence, that the payee's name indorsed on the bill was not the name of the real person to whom the bill was drawn payable, in which case the plaintiff could not recover, though there was no fraud in the holder, who might have come *bona fide* by the bill.

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Gibson v. al. v. Minot and Fector. H. Black. Rep. 569.

But where a bill of exchange was drawn payable to a *fictitious payee, and that known to the acceptor*, as well as to the drawer, who had so drawn it, and the name of the fictitious payee indorsed on *it, with the knowledge also of the acceptor*, which fictitious indorsement was to the drawer himself or order, and he (as indorsee) indorsed the bill over to the plaintiffs for a valuable consideration, it was resolved that the acceptor should not be allowed to avail himself of the circumstances, that the payee's hand-writing as the first indorser could not be proved, since there was no person in being as payee in this case, and that known to the acceptor, when he accepted it ; but he should be liable to it as *a bill payable to bearer*, or perhaps as a bill payable to the order of the drawer, or on a count, stating the special circumstances

In

In this case the defendant and others drew a bill on the defendant alone, in favour of a fictitious payee, the name of this fictitious payee he indorsed on it to himself, and then he indorsed it over to the house of Lewis and Potter, who indorsed it over for a valuable consideration to the plaintiffs. On the same objection on the part of the acceptor, as in the last case, the court over-ruled it, and held, that the plaintiff might recover on a count for money had and received, or money paid.

Tassock v. Harris. 3 Term Rep. 174.

5. If an action is brought on a promissory note *against the maker by the person to whom it is made payable*, the defendant will be admitted to impeach the promise and go into the consideration: as to shew it was illegal, as here, that it was given on a smuggling consideration; or to shew that it was delivered as an escrow, *ex. gr.* as a reward for procuring the defendant to be restored to an office, which the plaintiff had not effected, and so the condition was not performed: in which case the plaintiff could not recover.

Guichard v. Roberts. 1 Black. Rep. 445.

Jeffries v. Austen. 1 Stra. 674.

"So where the *indorsee* knows the consideration on "which the bill was given, it was held that the defendant "might impeach the bill."

Steers v. Lashleigh. 6 Term. Rep. 51.

For where the defendant, being engaged in stock jobbing transactions, had employed a person of the name of Wilson as his broker, who paid the differences with his own money, but some disputes arising between the defendant and Wilson, they had agreed to refer the matter to the arbitration of the plaintiff, who had awarded the sum of 300*l.* to be due to Wilson: this sum was paid in bills of exchange at different dates; one for 100*l.* was drawn by Wilson on the defendant, who had accepted it: Wilson indorsed the bill to the plaintiff, and on it the action was brought. Lord *Kenyon* ruled, That the bill, having been given on account of the payment of differences arising from illegal transactions, and as the plaintiff, from his situation as arbitrator, must have known this, that he could not recover on it.

Snelling v. Briggs, at Reading, 1741. Bull. N. P. 274.

But when the action is *not between the original parties themselves*, as where it is *by the indorsee*, without notice, the consideration of the note shall not be allowed to be disputed. Therefore where the action was against the indorser, Lord *Raymond* would not suffer him to give in evidence, *that the plaintiff desired him to indorse the note, to enable him to bring an action against the drawer of the note, and had promised that he would not sue him.

Collett v. Griffith. H. 2. G. 2. G. Hall. Bull. N. P. 274.

*[38]

Siddons v. Stratford. Peake's N. P. C. 215.

So where a party who at the request of the holder had put his name upon a promissory note, was there by obliged to pay the contents to a *bona fide* holder, it was held that he might recover the money paid from any person whose name is on the note, although he knew it was given on an illegal consideration.

"But

" But where a person gives a note for the purpose of aiding " another in fraud, as in procuring a marriage, *ex. gr.* such " note shall be absolute against him."*

Montefiori v. Montefiori. 1 Black. Rep. 363.

As where the plaintiff being engaged in a marriage-treaty, the defendant, who was his brother, to assist him in his designs, and to represent him as a man of fortune, gave him a note for a large sum of money, as the balance of accounts between them, which the defendant acknowledged to have in his hands, though in truth no such balance existed, it was resolved, That where, upon proposals of marriage, third persons make representations different from the truth, they shall be bound to make them good. Therefore the defendant having misrepresented the plaintiff's circumstances to the amount of the note, he should be chargeable with it.

Per Buller, J. Term Rep. 615.

" And so in the case of bills of exchange, *after indorse-* " *ment, the acceptor* shall not be allowed to question the bill " as forged, for he is bound by his acceptance, even though " the bill was forged, from the credit it receives from the " indorsee, by reason of the acceptance."

Price v. Neale. 3 Burr. 1354. 1 Black. Rep. 390. S. C.

And therefore where two bills of exchange were actually forged on the plaintiff, and the defendant took them as indorsee *bona fide*, and the plaintiff had paid the money; it was adjudged that he could not recover it back from the fair indorsee.

Jennys v. Fawler. 2 Stra. 946.

So where in an action by the indorsee of a bill of exchange against the acceptor, the plaintiff rested on the proof of the acceptance, the defendant offered to prove it a forged bill. by calling persons who knew the hand of the drawer, and who would swear they did not believe it to be his; but *Ch. J. Raymond* refused to admit this evidence from the danger to negotiable notes, and because a man might by design write contrary to his usual method, and inclined strongly to think that proof of actual forgery, would not excuse the defendant against his own acceptance, which had given the bill a credit with the indorsee.

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6. " No person can be charged through the medium of a " bill of exchange, as drawer, acceptor, or indorser, unless " his name appears on the bill; for if the holder of a bill of " exchange sends it to market, without indorsing his name " on it, he sells the bill, and the person who gives cash for " it, takes it on the credit of those only whose names appear " on it: this is, provided the holder did not know the bill " to be a bad one; for if he knew the bill to be bad, he " shall refund the money, on account of the imposition."

Penn v. Harrison. 3 Term Rep. 757. S. C. 4 Term Rep. 177.

So that if a merchant, having such a bill, gives it to his clerk to get discounted, *with injunctions not to put his name on it*, the master shall never be called on for the money; but if he gives it to his clerk, and *does not say that he will not indorse it*, and the clerk warrants the bill, he shall be considered as

the

the agent for the merchant, and his act shall bind him, and the merchant shall be liable to the holder in *an action for money had and received.*

But if a party discounts a bill with a banker, who gives him other bills in the discount, but does not indorse them, and they turn out to be bad, the banker is not liable. Fydell v. Clarke. Espin. N. P. C. 447.

2. *Of Bills of Exchange or Notes negotiable without Indorsement.*

This is the case of all notes payable to *bearer* or to *J. S.* or *bearer*, which from their nature require no indorsement, but are transferable by delivery only; in which case, the person who comes fairly by such bill or note, may bring an action on it in his own name. But where the action is so brought by the *bearer* in his own name, it is incumbent on him to prove that he gave for it a fair and valuable consideration, if there is any evidence to create a suspicion as to the manner in which the bill came to his possession. 3 Burr. 1521. Hinton's case. 2 Show. 235.

"And it matters not how the person who possessed it "came to possession of the bill or note, provided the holder "who brings the action gave for it a good consideration, "and came by it in the fair course of trade."

For where the mail was robbed and a Bank of *England* note taken out, which was passed by the highwayman to the plaintiff, who was an innkeeper, in the course of his business; this was adjudged to give a full and indefeasible property in the note to the innkeeper. Miller v. Race. 1 Burr. 452.

In like manner where the defendant gave to one *Bicknell*, who was his ship's husband, an order on his banker, in those words, "Pay to the ship *Fortune, or bearer*, 70*l.*" *Bicknell* lost the note. The person who found it passed it to the plaintiff in payment of money for goods *bona fide* sold, and the plaintiff recovered in this action the amount of the bill. Grant v. Vaughan. 3 Burr. 1516. 1 Black. Rep. 485. S. C.

"And the case is the same of a bill of exchange which "*passes by indorsement*; for in every case where the holder "can prove that he gave for it a *bona fide* consideration, he "shall recover the full value."

For where in an action on a bill of exchange against the defendants as drawers, the case was, that the bill was drawn by the defendants at Halifax in Yorkshire, on Smith and Payne, of London, payable to one Ingham or order; Ingham indorsed it to one Daltry, who indorsed it to one Fisher, from whom it was stolen; it was afterwards passed to the plaintiff, who was a mercer at Scarborough, in payment of goods, by a person who called himself William Brown, who indorsed it in that name. On action brought against the defendants, the plaintiff recovered, the Court being of opinion, that a blank indorsement was as if made payable to bearer, and that the plaintiff having taken it in the fair course Peacock v. Rhodes. Dougl. 613.

of trade, had nothing to do with the intermediate transaction, he not being privy to it.

Anon. Salk. 126.

These decisions are founded on the consideration due to bills of exchange and promissory notes as the medium of business, whose circulation is not to be impeded. And therefore a bill, if lost and found by any person, gives him no property *against the owner*, though it does against all other persons, and the owner may have trover for the bill in the finder's hands; but when it once becomes fairly transferred in the course of trade, the owner's property is from that time at an end.

"Therefore if a banker, or the acceptor of a bill of exchange, pays a bill so drawn on him, he shall not be liable "to the owner of the bill, if the bill has been lost or stolen; "*provided such payment has been made by him in the fair course* "*of trade and business: aliter*, if paid out of such course "of trade."

De Silva v. Fuller. Sitt. Lond. East. 1776. MSS.

For where in trover for a bill, draft, or check, drawn by one Cox on the defendants, who were bankers, payable to No. 437, or bearer, on demand, it was drawn the 17th of *June*, but dated the 18th. On the 17th the plaintiff received it, that day he lost it, and the same day (17th) it was presented to the defendants, who paid it; it was proved to be *contrary to the usual course of business, to pay drafts before the day on which they were dated*, and on that ground the plaintiff had a verdict.

I have hitherto considered those matters in which promissory notes and bills of exchange agree, *viz.* that negotiability which is common to both. I shall now consider those points wherein they differ; that is, the *acceptance and protest of bills of exchange.*

3. Of the Acceptance of Bills of Exchange.

Under this I shall consider, 1st, What shall amount to an acceptance. 2dly, Of the manner of acceptance. 3dly, Of the effect of an acceptance, and how it may be discharged.

[41]

1. *What shall amount to an Acceptance.*

Lumley v. Palmer. 2 Stra. 1000.

1. A verbal acceptance of a bill of exchange shall be sufficient to charge *the acceptor.*

But note, that if the acceptor does not pay, in which case the payee must resort to the drawer, the acceptance must be *in writing*, in order to charge the drawer *with costs and damages*, if the bill is an inland bill of exchange, by stat. 3 & 4 *Ann. c.* 9.; and if a foreign, by stat. 9 & 10 *W.* 3. *c.* 17.

Per Lord Mansfield. Cowp. 573.

2. The mere answer of a merchant to the drawer, "that he would duly *honour the bill*," is no acceptance except

cept accompanied with other circumstances, which may induce a third person to take it by indorsement: but if there are any such circumstances it may amount to an acceptance, even though the answer be contained in a letter to the drawer.

As where other words are added, *they* may amount to an acceptance. As where a merchant by letter says, "*Your "bill shall be duly honoured and placed to your debit.*" This was adjudged to be a sufficient acceptance. Per Lord Hardwicke. 1 Atk. 612.

So it is not a sufficient acceptance of a bill of exchange, to say, "There is your bill; it is all right." For where in an action against the defendant as the acceptor of a bill of exchange drawn from Dominica, it appeared that the bill had been left for acceptance with the defendant by the plaintiff's clerk: the next day he called for the bill, when the defendant returned it, at the same time making use of the foregoing words. It was held, that those words could by no implication amount to an acceptance; as they conveyed no evidence of the defendant's intention to bind himself to the payment of the bill at all events, which was necessary to charge him as acceptor. Powell v. Jones. Espin. N. P. C. 17.

3. "The acceptance may be *an absolute or a conditional* "*undertaking*. If a conditional one, the holder may refuse "it; but if he adopts it, it shall charge the drawee when "the condition is performed." 2 Stra. 1152. Cowp. 573. Julian v. Shobrooke. 2 Wils. 9.

"And whether an acceptance is absolute or conditional "is matter of law and not of fact: and the payee must at "the time of tendering it, take it in one light or other, and "abide by such election; for if he conceives the acceptance "to be conditional, and does any act by which he shews his "dissent to adopt such acceptance, in such case he cannot "afterward sue the drawee *as acceptor*."

Therefore where the plaintiff declared against the defendant, *as acceptor*, and the circumstances were, that the bill was drawn on the defendant payable to one Lenox, forty-one days after sight; Lenox indorsed it to the plaintiff. In *September* the plaintiff's clerk presented the bill to the defendant for acceptance, who told him that the drawer had consigned a ship and cargo to him and another person at Bristol, but as he could not know whether the ship would arrive at London or Bristol, he could not then accept the bill; upon which the clerk said, he would leave the bill upon condition that if the defendant did not afterward accept it, that he should be at liberty to note it from the time when he had first presented it. To this the defendant assented, and the bill was left accordingly. In the month of October the clerk called again, and the defendant being pressed to give an answer, whether he would accept or not, said, "the bill was a good one, and "*that it would be paid even if the ship was lost.*" The clerk on this carried the bill to a notary, and *noted it for non-acceptance from the time it had first been tendered*; the ship arrived safe Sprout v. Matthews. 1 Term Rep. 182.

safe in London, and was disposed of by the defendant, and then the plaintiff brought his action against the defendant as acceptor. It was resolved, That this was only a *conditional acceptance*, which the party had liberty to adopt or not; that having refused it by noting the bill, he was not at liberty afterwards to sue the defendant as acceptor.

In questions therefore between the payee, or indorsee, and the acceptor, the matter often turns upon what is an absolute and what a conditional acceptance. As to which it has been decided.

1. "Where the acceptance is made *with reference to some* "*fund*, which is to provide for payment of the bill, it is a "conditional acceptance."

Pierson v. Dunlop. Cowp. 57.

As where the drawees of a bill of exchange received a navy bill assigned to themselves, as a counter security for the payment of the bill drawn on them, and on the bill being tendered for acceptance, they said, "that they could not accept the bill of exchange till the navy bill was paid." This was held to be an undertaking to accept when the money was received on the navy bill, and when received, the drawee liable.

Smith v. Abbot. 2 Stra. 1152.

So where the defendant accepted a bill of exchange to pay it "when goods consigned to him, and for which the "bill was drawn were sold," it was held to be a conditional acceptance.

2. "Where the acceptance is made *with reference to any* "*account* between the parties, it shall be deemed con-"ditional."

Molloy de Jur. Mar. 230.

As where a merchant says, "leave the bill with me, and I will look over the accounts between the drawer and me; call to-morrow, and accordingly the bill shall be accepted;" this is not an absolute acceptance, because it refers to a balance of account.

[43]

4. "Wherever the drawee *gives a credit to the bill by any* "*act* whatever, that shall be deemed an acceptance, and "shall bind him."

Moor v. Withy. Trin. 10 G. 3. Bull. N. P. 270.

As where a bill was drawn by one *Newton* on *Withy* (the defendant) in favour of *Scot*, who indorsed it to the plaintiff. He tendered it for acceptance to the defendant, who underwrote thus: "Mr. *Jackson*, please to pay this note, and charge it to Mr. *Newton*'s account. *R. Withy*." It was insisted that this was no acceptance, for the defendant did not mean to become the principal debtor, it was only a direction to *Jackson* to pay out of a particular fund; and if there was no fund, the money was not to be paid. But, per *Curiam*, the underwriting is an acceptance, and the mode of payment is a transaction between them two only, and it signifies not to what account it is to be put when paid.

So

So where the defendant on whom the bills were drawn, in a letter said, "I will pay the bills in case the owners of the ship Queen *Ann* do not; I think it necessary to acquaint them, but rest satisfied of the payment." This was held to be a good and sufficient acceptance, being an undertaking at all events to pay the bill. Wilkinson v. Lutwidge. 1 Stra. 648.

For an *implied acceptance* is sufficient to charge the drawee, and that need not be in the form of a promise, as any thing written on the bill by the drawee not expressing a direct refusal to accept, as *presented*, *seen*, will, if unexplained by other circumstances, be deemed an acceptance. Comb. 401.

But where a person received a bill, kept it for six days, and entered on it No. 84. 5 *May*; this was adjudged not to be a sufficient acceptance, it being proved to be the custom of the drawee so to *mark and enter all bills, whether he meant to accept them or not.* Powell v. Monier. 1 Atk. 611.

So where a request was made to the drawee to accept a bill, and to secure himself by drawing a bill to the amount of the first on a third person, it was held that the *mere act of drawing such bill as directed* did not amount to an acceptance; and he having paid the bill drawn on him, and that which he had drawn on the third person being dishonored, he recovered back again the money he had paid. Smith v. Nissen. Trin. 26. Geo. 3. B. R. 1 Term Rep 269.

2. *Of the Manner of Acceptance.*

1. "No person (as wife or servant) can accept a bill of "exchange so as to bind the master without lawful authority, "(as a letter of attorney or the like,) *unless such person has* "*usually done so in the absence of the master, and for his ac-*"*count.* And if such person accepts a bill generally drawn on "him, though on his master's account, it shall bind the per-"son himself, and not his *principal.*" Molloy. 282. [44]

For where the plaintiffs were indorsees of a bill of exchange, drawn in these words, "Thirty days sight pay to "*T. S.* or order, 200*l.* value received, and place the same "to the account of the York-Buildings Company, as per ad-"vice from *Charles Mildmay.* To Mr. *H. Bishop*, Cashier "of the York-Buildings Company, at their house, Winches-"ter-street, London. Accepted 13 *June*, 1732, *H. Bishop.*" It was proved for the defendant, That *the letter of advice was addressed to the Company*, that the bill was brought to their house, and that he was ordered to accept it, as he did others. But it was resolved on a motion for a new trial, that the defendant was personally liable; for it was drawn on him, accepted generally, and not as a servant to the company; to whose account he had no right to charge it till he had actually paid it; that this being an action by an indorsee, it would be of dangerous consequence to trade to admit evidence from extrinsic circumstance, as the letter of advice. Thomas v. Bishop. 8 Stra. 915.

advice. That this differed widely from the case of a bill drawn, addressed to the master, and underwrote by the servant, in which case the servant would not be liable, but his acceptance be considered as the act of the master: that a bill of exchange was a contract to bind the parties, and the whole of it should appear in writing; that here was nothing in writing to bind the company, nor could any action be maintained against them on it; for that the address to the defendant was only to denote the person, and his place of abode, with more certainty. But they said, that had the action been by the payee, *T. S.* it might have been different, as he was privy to the transaction, and tendered the bill to the company; but the plaintiff being a stranger, that these circumstances could not be considered; so he had judgment.

Gardner v. Baillie. 6 Term Rep. 591.

But a power of attorney given by an executrix to act for her *as executrix*, does not authorise the attorney to accept bills to charge her in her own right, though for debts due from her testator.

Pinkney v. Hall. Salk. 126.

2. Where there are two joint traders, and *one accepts a bill drawn on both* for himself and partner, it binds both *if it concerns the trade*; otherwise, if it concerns the acceptor only in a distinct interest and respect.

Wigersloff v. Keene. 1 Stra. 214. Smith v. Scar. East. 14. G. 2. Buller N. P. 271.

3. Drawee of a bill of exchange *may accept it as to part*, or he may *accept it to pay half money and half goods, or when goods of the drawer are sold*; but the payee may refuse such a partial acceptance and protest the bill; that is, if the bill is accepted in part, there must be a protest, if not for the whole sum, at least for the part unpaid. After payment there must be a protest of the residue.

Molloy. 281.

[45]

4. "The acceptance of a bill should be *upon the bill itself*; but there may be a *collateral agreement* made before the bill has existence, *as an agreement to accept; and it shall bind the party so agreeing.*"

Pillans and Rose v. Vanmierop and Hopkins. 3 Burr. 1663.

As where the plaintiffs who were merchants in *Holland*, agreed to accept a bill of one *White*'s on them from *Dublin*, on condition that *White* would give them a credit on some house in *London* to the amount of the bill. *White* named the defendants; upon which the plaintiffs paid the bill drawn by *White*, and *then* they wrote to the defendants, to know if they would accept a bill on them on *White*'s account: they agreed to do it. In the interim *White* failed, before, in fact, the plaintiffs had drawn on the defendants; upon which the defendants wrote to them not to draw, as they would not accept their bill; notwithstanding which the plaintiffs did draw on them, and now brought an action for the amount, when it was adjudged that this was a sufficient agreement to accept, and bound defendants to the payment of plaintiffs' bill so drawn, they having previously accepted and paid the bill drawn on them by *White*.

"But

"But where there is such a previous agreement to accept, "if it is conditional in any respect, those conditions must "be strictly performed, or the agreement shall not be "binding."

As where a partner of an house in *London* being then at *Dominica*, wrote to the defendant, his partner in *London*, that the house of *Vance*, *Caldwell*, and *Vance*, in *Dominica*, having purchased a quantity of prize tobacco, he had agreed, on their giving the defendant orders to insure the quantity sent, and sending the bills of lading consigned to him in London; that their bills of exchange, drawn at the rate of 80*l.* per hogshead of tobacco, should be accepted by the defendant; it was held, that this did not bind the partner absolutely to accept; for it was conditional, *That tobacco be consigned, that it was of such a value, and that an insurance be made*. If any of these failed, there was no binding agreement to accept, and so to charge the drawee; and here in fact, the tobacco's only producing 40*l.* per hogshead, the defendant was held not to be liable. Mason v. Hunt. & al. Doug. 284.

5. A bill may be accepted *after the time of payment is elapsed*, and the acceptor shall be liable; for the substance of the promise is to pay the money, which is done by the acceptance. Milford v. Wallicot. Salk. 129.

But in such case, the declaration should regularly state a promise to pay *generally*, not *secundum tenorem billæ*. Jackson v. Pigot. Salk. 127.

* So a bill may be accepted to be made payable at a longer day than that on which it is drawn payable, and this shall bind the acceptor. Molloy. 239. *[46]

6. It is not settled how soon a bill drawn payable at sight ought to be sent for acceptance. In this case it was adjudged, That where a foreign bill of exchequer was negotiated on the royal exchange, and bought by the plaintiff, that he was *not bound to send it by the earliest opportunity*: but that it should be sent in reasonable time; and what that time was, was matter upon which the jury should decide: but that if he neither presented it, nor put it into circulation, in such case he was guilty of laches. Muilman v. D'Eguino. 2 H. Blak. 565.

3. *Of the Effect of an Acceptance, and how it may be discharged.*

1. "By the acceptance of a bill of exchange the acceptor "makes himself so absolutely liable, that he can never aver "the want of consideration or of goods in his hands belonging to the drawer: for the law of merchants knows no "*nudum pactum*." In case of Pillans and Rose v. Vanmierop & al. 3 Burr. 1663.

And therefore where there were dealings and an account current between the drawer and drawee as his factor, and a balance Maber v. Massias. 2 Blackst. Rep. 1072.

balance in fact due to the drawee, and he accepted a bill of the drawer's drawn on the goods in his hands, it was held that this should only be postponed to *prior acceptances*, and that he should not be allowed to *hold the goods for his own balance*; for if he meant to have reserved his own balance, he should have made a *special acceptance*.

Wilkinson v. Lutwidge. 1 Stra. 648.

Therefore where the action is against the acceptor by the payee, he is not obliged to prove the drawer's hand; for by the acceptance the acceptor has acknowledged the hand of the drawer as his correspondent. But the acceptor is not precluded from proving it not to be the hand of his correspondent.

Potter v. Tubb. Sarum Lent Ass. 1785. MSS.

So where in an action by the payee of a bill of exchange against the acceptor, the defence attempted to be set up was, that the consideration of accepting the bill was *a debt due by the acceptor to the drawer for smuggled goods*; it was ruled (by *Buller*, Just.) that this could not affect the plaintiff, unless the bill had been given to *him* for a smuggling debt; and that although the plaintiff should be proved to have known that the consideration between the drawer and the acceptor was illegal, it would make no difference as to him.

Symonds v. Parminter. 2 Wils. 185.

2. *An acceptance is an acknowledgment of debt to the drawer*, as having effects in his hands to the amount of the bill, and therefore where the drawee of a bill of exchange accepted it, he was held liable to the *drawer*, he not having paid the bill when due, which was returned protested, and paid by the drawer. But it seems that he might have accepted it for *the honour of the drawer*; in which case he would not have been liable.

[47]

2. *As to how an Acceptance may be discharged.*

It has been decided, 1. "The acceptor of a bill of exchange is in no case discharged from the payment of "it, unless he can prove that the bill was paid by the "drawer, or he receives an express discharge from the "holder."

Anderson v. Cleland. Sitt. East. 1779. MSS.

Therefore, where the indorsee of a bill of exchange brought an action against the acceptor, and it appeared that there was no demand of payment until three months after the bill became due, and the drawer was then insolvent, it was ruled by Lord *Mansfield*, That this was no defence, for the acceptor of a bill of exchange or maker of a promissory note remains *always liable*; acceptance is a proof of having effects in his hands, and he ought never to part with them, unless it appears that the drawer had provided another fund by paying the bill himself.

"So

"So *the discharge* from the holder must be *express*; an "implied discharge is not sufficient."

For where it appeared that in fact the bill had been accepted by the defendant, merely to accommodate one *Wheate* the drawer; the payee had indorsed it to the plaintiff. When it became due the plaintiff, understanding that it had been really an accommodation bill, for which the defendant never had any value, *applied to one Ready (Wheate's attorney) for payment.* Dunster, the defendant, wrote to the plaintiff, thanking him for not proceeding against *him*, and mentioning that he had been informed that *Wheate* had taken up the bill: but it did not appear that the plaintiff sent any answer to this. After this the plaintiff *received interest upon the bill from Wheate*, and also payment of another bill drawn at the same time by the same parties; the plaintiff suffered several years to elapse without calling on the defendant, or treating him as his debtor. It was argued for the defendant, that this was from the circumstances an implied discharge of the drawer. But it was held that the *discharge must be express, in order to discharge the acceptor.* Dingwall v. Dunster. Dougl. 235.

Therefore where the plaintiff, who was indorsee, first arrested the defendant the acceptor; but finding that no consideration had been given for the acceptance, his attorney took a security from the drawer, and then wrote to the defendant, "that he had settled with the drawer, and *the defendant need trouble himself no more about it.*" This was held to be an absolute discharge of the acceptor, and that he could never after be called on for payment. Black v. Peele, cited Doug. 236. [48]

"But where the discharge *is not in express terms*, but some "act has been done, which may amount to it, it seems "to be matter proper to be left to the jury, whether what "has been done by the holder shall amount to a discharge "of the acceptor or not."

For where in *assumpsit* on a bill of exchange for 30*l.* the drawer and acceptor were brothers, and the holder (the plaintiff) when the bill was due, received of the drawer 3*l.* 15*s.* who at the same time indorsed on the bill to this effect, "*Received on account of this bill* 3*l.* 15*s.*; *remaining* "*due* 26*l.* 5*s.* *I promise to pay Mr. James Ellis within* "*three months from the date hereof.*" This was signed by *James Galindo*, the drawer; the balance was never paid, and at the distance of three years the action was brought against the acceptor. The cause was tried before Lord *Mansfield*, who nonsuited the plaintiff. On a motion for a new trial, the court were of opinion, That it being a question of intention arising out of circumstances, that it ought to have been left to the jury, the bill being probably an accommodation one, the drawer and acceptor being brothers. Ellis v. Galindo. Dougl. 238.

2. "The laws of the country where the bill of exchange "is accepted, shall determine how far the acceptance

" binds; and if by those the acceptor has been discharged, " he shall be so here."

Burrows v. Jemino, 2 Stra. 733.

Therefore where a bill was accepted at *Leghorn* by the plaintiff, and by the laws of that place if a bill is accepted, and the drawer fails, and the acceptor has not sufficient goods of his in his hands, he shall be discharged from his acceptance, which here was the case; and the acceptor had instituted a suit in *Leghorn*, and his acceptance vacated by sentence there. It was held in Chancery on a bill for an injunction (the plaintiff being sued at law in *England* on his acceptance) that the acceptance being declared void by the laws of that place, was void every where, and the acceptor discharged.

3. " Where the drawee of a bill of exchange enters into " an agreement to accept on certain conditions, as in con- " sideration that goods of a certain value shall be consigned " to him, which is a virtual acceptance, if the condition is " performed; if before he has absolutely accepted the bills, " the holder of the bill takes the goods himself, and sells " them, it is a discharge to the drawee of such virtual ac- " ceptance."

Mason v. Hunt. Dougl. 284. 2 Res. *[49]

*For where the agreement to accept was on condition, that tobacco of 80*l.* value per hogshead was sent to the drawee's, and an insurance ordered by the drawers of the bills of exchange: they had consigned the tobacco accordingly, and drawn the bills in favour of the plaintiff, and he having applied to the drawee to accept, the drawee apprehending the tobacco not to be worth 80*l.* per hogshead, had refused to accept the bills; upon which the plaintiff *took the bill of lading, and the policy which had been made on the tobacco*, and when it arrived, *sold the tobacco himself*, it was clearly held that this discharged the drawees.

Molloy. 281.

And note, That when a person has accepted a bill of exchange, he ought not to pay it till it becomes due; because till that time it is subject to a countermand by the drawer, and therefore if a countermand comes after the drawee has paid the bills, the drawer is not answerable.

4. Of the Protest of Bills of Exchange.

Bills of exchange are to be protested either for non-acceptance when tendered, or for non-payment when due.

Barnaby v. Rigalt Geo. Car. 301. Salk. 131.

In the case of *foreign bills of exchange*, protests were by the custom of merchants at all times in use.

In the case of *inland bills of exchange*, the first protest allowed was for non-payment, and was given by stat. 9 & 10 *W.* 3. *c.* 17. It enacted, 1. " That bills of exchange " drawn

"drawn and dated from any place in *England* for 5*l.* or "upwards (in which should be expressed that they were "for value received) drawn payable a certain number of "days after date, may after acceptance (which should be "in writing) if not paid within three days, be protested "by a notary, or by any other substantial person of the "place, before two witnesses."

This statute, in order to entitle the holder of the bill to make a protest, requires that the acceptance shall be in *writing*. It therefore often happened that the *acceptor would accept verbally*, but not in writing, so that no protest could be made. To remedy this, the first protest of inland bills of exchange for *non-acceptance* was introduced by stat. 3 & 4 *Ann. c.* 9. which enacted, "That if the person on "whom an inland bill of exchange is drawn refuse to ac- "cept it *in writing*, the holder of the bill shall protest it "for *non-acceptance*." But this statute made a change as to the bills upon which a protest was required for non-acceptance or non-payment, requiring the protest for non-acceptance only in the case of *bills drawn for* 20*l. or upwards*, and in which was expressed that they were for value received.

[50]

And with respect to the notice necessary to be given, it is enacted by stat. 9 and 10 *W.* 3. *c.* 17. *s.* 2. "That the "protest shall be notified within fourteen days, to the party "from whom the bills were received, who (upon producing "such protest) shall repay such bills with interest and "charges of protesting; and in default of such protest, or "due notice within the days limited, the person so failing "shall be liable to all costs, damages, and interest."

By stat. 3 & 4 *Ann. c.* 9 *s.* 5. it was enacted, "That no "acceptance of any inland bill of exchange shall charge "any person unless underwritten or indorsed, and if not "so underwritten or indorsed, no drawer shall pay costs, "interest, or damages, unless protest be made for non-ac- "ceptance, and such protest or notice thereof be sent "within fourteen days to the person from whom such bill "was received; and if such bill be accepted, and not "paid within three days after due, no drawer shall pay "costs, damages, or interest, unless protest be made as "aforesaid, or notice given; nevertheless, the drawer shall "be liable to payment of costs, damages, and interest, if "any protest be made for non-acceptance or non-payment, "and notice given or sent."

And therefore in an action against the drawer by the holder of an inland bill of exchange which had been accepted, but not paid when due, and he had made no protest, it was adjudged that under this statute, in an action against the drawer, no interest could be recovered: the holder would

Harris v. Benson. 2 Stra. 910.

would then have had it as for money lent, and that appeared to be the consideration of the bill; but the Chief Justice said it had never been allowed barely for money lent without a note: so the plaintiff had judgment for the note, but without interest.

" For in such case of neglect of making the protest, the " right to recover the amount of the bill is no way affected, " it only goes to *the interest and costs.*"

Borough v. Perkins. 1 Salk. 131. 6 Mod. 81. S. C.

For the want of a protest is no bar to an action by the holder of an inland bill of exchange against the drawer: neither is it necessary for the holder to set out a protest in his declaration.

Gale v. Walsh. 5 Term Rep. 239.

But the case of foreign bills of exchange is different; for there in an action against the drawer, a protest for non-acceptance must be proved, or the plaintiff cannot recover.

[51]

" And where a bill of exchange is refused to be accepted, " an action *immediately* lies against the drawer."

Bright v. Purrier. Sitt. G Hall. Trin. 1765. Bull. N. P. 269.

For where a foreign bill of exchange was drawn payable one hundred and twenty days after sight, and when it was tendered for acceptance it was refused: upon this an action was immediately brought against the drawer. At the trial the defendant objected that he was not liable till the end of the one hundred and twenty days, and offered to call evidence that the custom of merchants was so; but Lord *Mansfield* said the law was clearly otherwise, and refused to hear the evidence: so the plaintiff recovered.

This statute therefore (9 & 10 *W.* 3.) gives damages *against the holder* of the bill if he does not give notice to the drawer, and any damage arises in consequence: but the stat. 3 & 4 of *Ann. c.* 9. *s.* 5. deprives the holder of damages, interest, and costs, if he neglects to protest, either for non-acceptance or non-payment, and give notice within fourteen days.

As to protests, these points are settled.

1. " If a bill is not accepted, it should *immediately* be pro- " tested and notice given to the drawer: for it is not suffi- " cient to give notice of the *non-acceptance* when the bill " *becomes payable.*"

Goostrey v. Mead. West. 1751. Buller N. P. 271.

For where the defendant drew a bill in the *West Indies* on *T.* in *London*, at sixty days sight, payable to *W. S.* or order; he indorsed it to the plaintiff, who presented it for acceptance, and was refused: the plaintiff then noted it for non-acceptance, *but did not protest it till the end of sixty days*, when he protested it for non-payment, and then wrote to the defendant and to his agent notice of the non-acceptance. Afterward, having brought this action against the defendant the drawer, he was nonsuited: for by not sending the protest

test for non-acceptance, he had made himself liable. And *Note*, The bill should be noted for non-acceptance the day it is refused: and when the protest is drawn, it may be dated that day.

Notice of non-payment or non-acceptance by the *first regular conveyance* is sufficient; as in this case of a bill of exchange drawn on Calcutta, it was held, that the holder was *not bound* to send notice by a casual foreign ship, by which advice might earlier have been given; but that it was sufficient, if sent by the direct way of the Company's ship or packet. Muilman v. D'Equino. 2 H. Black. 565.

"But though in general it is true, that a protest for non-"acceptance is necessary, and notice of non-payment to be "given to the drawer, in order that he may withdraw his "effects out of the hands of the drawees: yet, in the case "of inland bills, it has been decided, that *if it be proved that "there were no effects of the drawer's in the hands of the "drawees*, no such notice is necessary."

For where the plaintiff declared as payee of a bill of exchange, at forty days sight for 80*l.* value received, for the use of *Wm. Calvert*, drawn by the defendant on Messrs. *Berbeck* and *Black*, *London*; and which on being tendered for acceptance, was refused, for which it was then noted for non-acceptance, and afterwards protested for non-payment; the defence set up was *want of a protest for non-acceptance, and notice to the drawer*; this was rebutted, by shewing that neither at the time or afterwards the *drawees had any effects of the drawers in their hands*. Lord *Kenyon* ruled this to be a complete answer, and that, under those circumstances, a protest for non-acceptance and notice was unnecessary; the plaintiff recovered, and on a motion for a new trial it was refused, the direction being right. Rogers v. Stephens. 2 Term Rep. 715. *[52]

So though the drawer be entitled to notice, yet he may waive the want of it by a *subsequent promise*, as here by saying "the bill must be paid:" which shall bind him, if at the time he was aware, that he stood discharged by reason of the holder's laches. S. C.

And *quære*, if in the case of *a foreign bill of exchange*, if it appeared that there were no effects of the drawer's in the hands of the drawee, if that would not excuse the want of notice, as in this case a rule was given on that ground, to shew cause why a nonsuit grounded on the want of a protest should not be set aside: but that circumstance not appearing in the judge's report, the rule was abandoned. Gale v. Walsh. 5 Term Rep. 239. ante 50.

2. Where *a bill is lost*, and a new bill cannot be had from the drawer, a protest may be made, *on a copy*, particularly where the refusal of payment was not for want of the Dehors v. Harriot. Show. 163. 2 Res.

the original bill, but merely for another cause; so that the party who was to pay did not insist on the original bill's being delivered up. But if a bill is lost, and the drawer can be resorted to for a new bill, there a protest cannot be made on a copy; and by stat. 9 & 10 *W.* 3. *c.* 17. "If any inland bill of exchange is lost or miscarries, within "the time limited for payment of the same, the drawer "shall give other bills of the same tenor and date, secu- "rity being given to indemnify him if the first bill is "found."

Tassel and Lee v. Lewis. Ld. Raymond. 748.

3. By the custom of merchants there are three days of grace allowed to bills of exchange, and the bill is not to be protested till those three days are expired. But if the last is a *Sunday* or great holiday, the payee ought to demand the money on the second day; and if not paid, protest the same day, or it is at his own peril.

Brown v. Harraden. 4 Term Rep. 148.

So in the case of *promissory notes*, there are three days of grace allowed on them for the stat. 3 & 4 *Ann. c.* 9. which first made them negotiable, put them *in every respect* on the same footing with bills of exchange.

Molloy. 285.

4. If a bill of exchange is accepted and the party dies, yet there must be a demand on the executors or administrators; and if the bill is payable even before they can be appointed, yet should a protest be made.

Buller N. P. 271. Molloy. 285. [53]

5. If a bill is drawn on a person who lives in the country, and he is not to be met with, upon which his friend *accepts it for his honor*; this acceptance shall bind the person so accepting to the payment of the money; but the bill should be protested for want of acceptance by the original drawee; for as the drawee might have effects of the drawer in his hands, the drawer ought to have notice in order to secure them.

Buller N. P. 271. Molloy. 285.

6. If a bill be left with a merchant to accept, he to whom it is payable, in case it be lost, is to request the merchant to give him a note for payment of the money according to the time limited by the bill; otherwise there must be two protests, one for non-acceptance, the other for non-payment.

Buller N. P. 270.

7. The protest is made before a notary public in case of non-acceptance or non-payment; to his protest all foreign courts give credit, and the protest is evidence that the bill is not paid. But in *England* the bill itself must be shewn as well as the protest, because the whole declaration must be proved: and when a bill is returned protested, the drawer of the bill is obliged to answer the money and damages, or to give security to answer the same beyond sea, within double the time the first bill had to run. But in *Molloy*, 283, it is said, he shall only have as much time as the first bill had to run.

8. The

8. The stat. 9 and 10 *W.* 3. 17. by which protests of bills of inland exchange were first given, mentions bills payable so many days *after date*, it therefore does not extend to bills payable *after sight*. Therefore where an inland bill of exchange was so drawn, and not being paid when demanded, a sum of two shillings and six pence was demanded for noting it, it was adjudged that no such charge was demandable against the acceptor. Leftly v. Mills, 4 Term Rep. 171.

Having thus far considered the nature and negotiability of bills of exchange, we shall conclude with the cases on the head.

5. Of the Nature of Payments by Bills of Exchange or Promissory Notes.

Upon this head it is to be observed, that where a payment is made by a bill of exchange or draft on a banker, that such being in the usual course of business, where there has been no laches or fraud; such is a good payment; and therefore where in payment of three bills of exchange, which had been sent up to London by the plaintiffs to the defendants, who were bankers, the defendants tendered the bills for payment to the acceptor, and he gave them a checque upon a banker in London for the amount; upon the receipt of which the defendant gave up the bills: the cheque was afterwards dishonoured. It was held not to be culpable negligence in them, or such as would subject them to an action, that being the usual course of trade in London. Russell v. Mankey. 6 Term Rep. 12.

"But the payment by a draft or bill of exchange which is "fraudulent, as where there are no effects in the hands "of the person upon whom it is drawn, is not a good pay-"ment."

For where a person was arrested, and gave his draft for part of the debt, upon which he was discharged; but the draft being dishonoured, the party was again arrested, and applied to the court to be discharged. It was held, that where payment is so made by a bill or draft which turns out to be unproductive, the plaintiff might consider it as a nullity, and again arrest the defendant. Puckford v. Maxwell. 6 Term Rep. 52.

But payment by a bill of exchange was formerly deemed to be no discharge for a precedent debt, unless there was an express agreement that it should be so: as to inland bills, it is now enacted by stat. 3 & 4 *Ann. c.* 9, *s.* 7. that "if "any person accept such a bill of exchange for and in "satisfaction of a debt, the same shall be esteemed a full "and sufficient discharge, *if the person accepting such bill for "his debt, does not take his due course by endeavouring to get "the same accepted and paid, and make his protest for non-pay-"ment or non-acceptance.*" Clarke v. Mundal. Salk. 124. 3. W. & M. Temp.

But

But if the holder of the bill of exchange or promissory note does use due diligence to get payment of the bill or note, and follows the direction of the statute; if the bill or note is not paid, he does not sustain the loss. The cases therefore upon this head turn upon the question, What shall be deemed due diligence to get the money from the acceptor of a bill or maker of the note? (for the law as to these in respect to laches is the same); and it goes on this principle, that by keeping possession of the bill or note after it becomes due, without getting the money from the acceptor or person who is first liable to the payment, it is giving an implied credit to such person, and by not giving notice (in case of his failure) preventing the indorser or person who paid away the note from getting the money, or otherwise securing himself.

1. *As in the case of Promissory Notes.*

Anderson v. George. 1 Burr. 353. Tindal v. Brown. 1 T. Rep. 167. S. P.

The plaintiff in this case sold goods to the defendant, who paid him with a promissory note of *A's*: the plaintiff demanded the money from *A. but gave him time repeatedly* till *A.* failed. It was adjudged that the loss should fall upon the plaintiff, who by so giving credit had discharged the defendant.

Rellock v. Robinson. 2 Stra. 745.

So where the indorsee of a promissory note *received part of the money from the drawer of the note*, it was held to be a taking upon himself to give the whole credit to the drawer of the note, and absolutely to discharge the indorser.

2. *In the case of bills of Exchange.*

Gee. v. Brown. 2 Stra. 792.

In an action on an inland bill of exchange by the indorsee against the drawer, it appeared that the bill was due the 14th of *May*; but that upon a promise of payment, the *indorsee gave the acceptor time till the 20th of May, and so on at different times till the 7th of June*, when the acceptor failed: and there being no notice to the drawer, the loss was adjudged to be against the indorsee.

I shall now consider the particular cases in which the holder of the bill shall be charged with the loss, by reason of his neglect, or be exempt from it from having used a due degree of diligence.

[55]

1. "Where a bill of exchange is drawn on any person, it "is presumed that the drawee has effects of the drawer's in "his hands to the amount of the bill; if he therefore *refuses* "*to accept it, notice must be given to the drawer*, in order that "he may take steps for his own security; and if such notice "is not given and the drawee fails, the payee or holder of "the bill must stand at the loss. So in the case of indorsed "bills, like notice must be given *to the indorser* of the drawee's refusal to acept the bill: because that may deprive "the

St. 3. & 4 Ann. c. 9. s. 7.

" the indorser of the means of getting the money from the " drawer, or from the prior indorsers."

For where the defendants, who were payees of a bill of exchange, indorsed it over to the plaintiff before it had been accepted, and on being tendered for acceptance by the plaintiff, the drawee refused to accept it: the plaintiff *gave no notice of this for three weeks to the defendants*; and at the end of three weeks the drawer failed: the loss was adjudged to fall on the plaintiff, for as the drawer was liable to the defendants who were payees, and he continued solvent for three weeks; if the plaintiff had given notice, the defendants might have obtained the money from the drawer, and therefore the plaintiff should suffer for his own neglect and laches. Blissard v. Hurst & al. 5 Burr. 2670.

But where it appears that *there were no effects of the drawer's in the drawee's hands*, so that no possible loss could accrue to the drawer from want of notice, as if drawn fraudulently for a blind or delay, where the parties have no dealings, there the payee or indorsee shall not stand at the loss of the amount of the bill from not having given notice; for there the foundation of the rule fails, (*vide* this case *plen.* chap. of Trover, & *ante* 51,) and this decision has since been often recognized. Bickersdike v. Bollman. 1 Term Rep. 405.

But the case is different in respect to an indorser, for as he has no concern with the accounts between the drawer and drawee, he is in all cases entitled to notice; and the drawee's having no effects of the drawer's in his hands, is no excuse for not giving notice to the indorser of the bill being dishonoured. Wilks v. Jacks. Peake. N. P. C. 202.

" The rule here laid down applies to the cases of promis- " sory notes after indorsement."

For where one Brown made his promissory note payable to the defendant, who indorsed it to the plaintiff, Brown had no value for the note from the defendant, who knew at the time that Brown was insolvent; it was not presented to Brown till the day after it was due, nor was any notice given to the defendant for five days after; it was held, that there being no effects in the defendant's hands, the necessity of notice was dispensed with, and plaintiff recovered. De Berdt v. Atkinson. 2 H. Black. 336.

" And though in such case the indorser makes a proposal " or promise to pay, *if made under ignorance of the holder's* " *laches*, it shall not operate to charge him."

For where this action was brought by the indorsee against the indorser, and the circumstances were, that a bill of exchange was on the 4th of *November*, 1786, drawn by one *Lutwich*, on *John Rutter*, in favour of the defendant, at sixty-five days after date, the defendant indorsed it to the plaintiff, *who tendered it to Rutter for acceptance* on *the 8th of Novem-* *r*, when *it was refused*; the plaintiffs never gave any Goodall v. Dolley. 1 Term Rep. 712.

[50]

notice of the refusal *till the 6th of January*, when by letter the plaintiff informed the defendant merely of the return of the bill, *but no circumstance of the tender and refusal by Rutter:* the bill expired on the 11th, and the next day *the defendant made a proposal to pay the bill by instalments; Heath*, Justice, before whom the cause was tried, was of opinion, That this proposal being made under ignorance of the circumstances of the case, the defendant was discharged by the laches of the plaintiff. On a motion for a new trial, the Court held, 1st, The judge's directions to be right: 2dly, Evidence being offered in order to obviate the necessity of notice, that *Rutter* was insolvent, and so the drawer could receive no injury from want of notice; the Court held, that had the action been against the drawer, that might be material, but could not be so when against the indorser.

1. And on the same principle, where payment is made by "any draft on a third person, it *ought to be immediately tendered for acceptance or payment*; for though the drawee may "be solvent when the draft is drawn, if it is kept long untendered for acceptance, he may become insolvent."

Chamberlyn v. De la Rive. 2 Wils. 353.

Therefore, where the defendant being indebted to the plaintiff, paid him by a draft on one *Heddy*, payable a few days after date, and the plaintiff held the bill for four months, without applying for payment. *Heddy* afterwards became insolvent. It was adjudged that the loss should fall on the plaintiff for his neglect.

2. "Where bills *have been accepted* and paid away, or "promissory notes passed in like manner, the law is the "same."

"The acceptor of a bill of exchange being *at all* "*times liable* (*ante* 46.) no question can ever arise on the circumstance of loss, except in the case of his insolvency. So "in case of promissory notes, the only question that can "arise there, is, when the maker becomes insolvent."

How far the parties are liable or discharged, it has been decided,

1. "Every payee or indorsee should apply for payment "of an accepted bill *as soon as it is due*, or in case of a loss "he must sustain it; for by holding it beyond the time "when it is payable, it is giving a new credit to the acceptor or maker of the note."

Coleman v. Sayer. 2 Stra. 829.

* The bill in question was at six days sight, accepted the 8th of *February*, and by the three days of grace was payable the 17th, which was on a *Saturday*, the bill was not then tendered, and the acceptor stopped the *Tuesday* following: it was adjudged that the drawer was discharged at the end of the three days of grace.

*[57]

For

For if the bill is kept for a long time it shall be presumed to be paid, because there is a trust between the parties, and it may be prejudicial to commerce if a bill may rise up to charge the drawer at any distance of time, when in the mean time all reckonings and accounts are adjusted between him and the drawee.

Allen v. Deckwra. Salk. 127.

" So in the case of promissory notes, the *maker of the* " *note should be applied to for payment when it becomes due*, or " the holder, in case of a loss, must suffer it."

For where the third indorsee of a promissory note kept it for two months without receiving the money from the maker: in an action against the first indorsee without notice, the plaintiff was nonsuited for his neglect, in not getting the money from the maker of the note when it became due.

Pepys v. Sir John Lambert. 1 Stra. 707.

2. " But circumstances may occur in which the note or " bill may be held beyond the time it becomes payable, and " yet the holder not be charged in case of a loss. For the " mere holding beyond the time, seems *not of itself* to amount " to a charge against the holders, but may be explained by " circumstances."

As where the defendant having a promissory note payable to him or order, two months after date, of one *Smith*, indorsed it to the plaintiff, who sent his servant for the money to *Smith*; *Smith* said, that the defendant had promised not to indorse it without first acquainting him; and that he was not then ready, but would pay it in a few days, and so put it off from time to time: after three weeks elapsed, the plaintiff wrote to the defendant, (not having sooner learned his address, though it was proved that he had sooner enquired after it) the circumstances above. Then *Smith* failed: the plaintiff wrote again; and the defendant answered, *that when he came to town he would put all matters to rights*. Upon this evidence the jury gave a verdict for the plaintiff, though it was proved that *Smith* continued solvent for above three weeks, and paid upwards of 100*l.* in that time.

Anson v. Bailey. Mich. 1748. G. Hall. Bull. N. P. 276.

" It does not appear upon what ground this verdict was " given, whether on the ground of due diligence having " been used, or on the ground of the new promise, and it " should rather seem to be the latter."

For where the plaintiff received a note of one *Yardley*, payable to the defendant. When it was due the plaintiff sent the note to demand the money, but not finding *Yardley*, he kept the note for seventeen or eighteen days, during which time it was proved that he used due diligence to find him: he then wrote to his agent to inform the defendant, who returned no answer. About ten days after, the agent went to the defendant, who acknowledged the receipt of the letter;

Whitaker v. Morris. Worcest. Lent. Ass. 1756. MS.

ter; and said, the reason why he had not sent an answer was, that *Yardley* had promised to order payment in *London*, and as it was not paid, that he would certainly pay it the day after. The defendant's witnesses proved, that *Yardley* was solvent when the note became due, and for some time after; but was then insolvent. *Per Wilmot*, Justice. Holding the note for so long a time was unreasonable, and would have discharged the defendant, if when he received the first notice he had disclaimed the having any thing to do with it; but by his conduct he has waived the neglect, and acquitted the plaintiff: however, he left it to the jury, who found for the defendant.

Per Cur. 1 Term Rep. 169.

3. "And what shall be deemed reasonable notice of non-"payment is matter of law, not of fact: and therefore the "courts controul questions on that head in going to the "jury."

Goodman v. Shipway. Mich. 11 Geo. 2.

Therefore where the plaintiff kept bankers' bills in his possession from *April* to *August*, and the banker having failed, he brought his action against the person who had paid them to him, and had a verdict. The Court granted a new trial.

Appleton v. Sweetapple. Mich. 23 G. 3. B. R. MSS.

So where the case was, that the plaintiff received from the defendant a banker's note at one o'clock in the day, but did not call for payment the whole of that day, and in the evening of it the banker failed; a verdict was found for the *defendant*, on the ground that it was the custom of the city that bankers' notes should be brought for payment the day they are received: but on a motion for a new trial, it appearing that there were many exceptions to this custom (as in the case of factors at *Bear-key*, the salesman at *Smithfield*, and others) the Court held the custom was not sufficiently proved; and even if the decision had been on that ground, it must appear that the custom was reasonable, or the Court would controul it; and therefore granted a new trial.

[59]

"So in the case of promissory notes, the law is the "same."

Tindal v. Brown. 1 T. Rep. 167.

For where on the 21st of *August* the note in question was made by one *Donaldson* for 35*l.* payable six weeks after date to the defendant *Brown*, and by him indorsed to the plaintiff, on the 5th of *October* the note became due, allowing the three days of grace; on which day one *Howell*, the plaintiff's clerk, went to demand the money from *Donaldson*: not finding him at home, he left word that the note was due, and desired he would send and take it up. On the 6th *Howell* called again upon *Donaldson*, who promised to take it up that day, within banking hours: on that day the note was not taken up; and on the 7th *Howell* again called on *Donaldson*, and not finding him at home, *he then sent it to Brown* for payment, who refused, saying, the plaintiff had made it his own. It was proved by *Donaldson* at the trial, that

that on *Howell's* leaving him *on the 6th, he went to Brown's house, and he not being at home, left word with his wife that he could not pay it, and desired Brown to take it up.* It was contended, as to this transaction, that *Donaldson* was to be considered as agent for the holder, and that this was notice to *Brown.* On a motion for a new trial (the jury having found for the plaintiff) it was resolved, 1. That the plaintiff by giving time so often to the maker of the note, had discharged the indorsee (the defendant): 2. That the notice here given was not regular, for *it should have been given by the holder of the note*, not as here, by the maker.

4. "But where the holder of the bill has used due dili-"gence, on that ground he shall be discharged from any "loss."

The note in this case, which was a banker's, was paid to the plaintiff after dinner, who *sent it next morning at nine for payment*, when the banker had stopped: it was ruled that there was no laches in the plaintiff so as to fix the loss on him; and that in all those cases there must be a reasonable time allowed, consistent with the nature of circulating paper credit.

Fletcher v. Sandys. 2 Stra. 1248.

So where the defendants made a payment to the plaintiffs, with two bankers' notes at two o'clock in the afternoon, at nine the next morning they were sent for payment, when the bankers had failed; it was adjudged that the loss should fall on the defendants, the plaintiffs having been guilty of no laches.

Moore v. Warren. Holme v. Barry. 1 Stra. 415.

"In these questions the usage and custom of business is "the standard to decide them, if such is reasonable."

*For where it was proved to be the usage of the Sword-Blade Company, when they received bankers' notes to send them next morning for cash to the bankers, which cash was made up in bags, and called for by the clerk in the evening: payment was made to them by the defendant at three o'clock in the afternoon of two notes; next morning they were sent to the bank, left there (as above,) and the bank stopped payment just before the clerk called in the evening. It was adjudged that the loss must fall on the defendant, though the money might have been received in the morning; for the company had only acted according to usage.

Turner v. Mead. 1 Stra. 416. Hoare v. Da Costa. 2 Stra. 910. S. P. *[60]

So where the action was by the Commissioners of Excise against the defendant, as drawer of a bill of exchange in their favour on one *Wilson*, and specifying in the bill that it was for king's money; when the bill became due, the clerk to the commissioners carried it to *Wilson* for payment: but his clerk said he was gone out, and had left no orders about the bill, and that therefore they must take the *six days*. This

Welford v. Hankin. G. Hall Sitt. Hil. 1763. MSS.

This was explained thus: That wherever a bill is drawn payable to the Excise, they usually allow six days beyond the three days of grace, if required by the acceptor, on payment of one shilling to the clerk at the six days end for his trouble; that this was never refused, and was well known to be the custom; and one witness swore, that he had heard the defendant mention it, but that he had always considered it as an indulgence rather than as a right: the note, including the three days of grace, was payable the 24th; no notice was given to the defendant (the drawer) till the 30th; and on the 24th *Wilson* had absconded. The defendant refused to pay, on the ground that notice was not given to him in due time. But *per* Lord *Mansfield*, It is not in the power of any particular officer, by particular indulgence in any case, to charge a drawer of a bill; but this is a general custom, and ingrafted on such bills, and being known universally, must bind the parties.

"But where there is no such usage to warrant it, the "law is, as before laid down, that the holder should apply "for payment *when the bill or note is due*: and any time "given beyond it is at his own peril."

Hayward v. Bank of Engl. 1 Stra. 550.

Therefore where the plaintiff, who kept cash with the Bank, on *Saturday* left a note there for 50*l.* on *Cox* and *Cleeve*, on *Monday* they gave it to the runner, who left it at the shop of *Cox* and *Cleeve* in the morning, who cancelled it. When the clerk called in the afternoon, *Cox* and *Cleeve* had stopped payment: upon which he took a new note, of the same tenor and date, from *Cox* and *Cleeve*. *King*, Ch. Just. directed the jury, that it would be dangerous to suffer persons to deal with notes in this manner; and that they should find for the plaintiff; which they did accordingly.

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5. "But in cases in which the loss shall fall on the holder "of the note, a distinction is to be observed in the cases of "*notes payable to the bearer*, when passed with or without in-"dorsement."

Bank of England v. Newman. 1 Ld. Raymond, 442.

If a note payable to bearer (supposing it has some time to run) be discounted without indorsement of the person who held it, he who so discounts it, takes it with all risques: for it is selling the bill like selling of tallies: but if the bill has been passed in payment of a debt antecedently due, or for money lent on the same bill, then is the person paying it liable to all risques. But if the person who gets the bill discounted, indorses it, then may the indorsee have a remedy on the indorsement, if he demands the money in convenient time. This was the doctrine of Lord *Holt*; but the jury found a verdict otherwise.

Fenn v. Harrison. ante 35.

But in the case of a *bill payable to order*, though the party has not put his name on the back of it, yet if the money has come to his use, the person who discounted it may nevertheless

less recover it back in an action against him for money had and received, unless he *expressly refused* to indorse the bill when it was discounted.

Before we conclude this head of bills of exchange, it may be proper to consider notes or bills as joint or several.

1. If a *note is joint and several*, the action may be brought against both, or against either. If the plaintiff declares against both, he must declare that the defendants promised to pay jointly and severally: but if against one only he must declare generally that the defendant promised to pay, and the note by two will be good evidence: for he that speaks in the disjunctive speaks true, if either member of the disjunctive be verified.

Butler v. Mallissey. 1 Stra. 76. Rees v. Abbot. Cowp. 832. Ovington v. Neale. 2 Stra. 819.

2. If the note had been a joint one, and the defendant had been sued as if several, the defendant could *only have pleaded that matter in abatement*, and not taken advantage of it in error.

Per Buller. justice in Abbot v. Rees, supra.

5. The next class of Express Contracts upon which this action is founded, which I shall consider, is that of

POLICIES OF INSURANCE. [62]

Under this head I shall consider, 1. What policies are good. 2. What shall avoid a policy. 3. The constructions on policies. 4. Of total, partial, and average losses. 5. Of the several losses within the terms of the policy. 6. Of Apportionment of the premium.

1. What Policies are good.

1. It is enacted by stat. 19 *G.* 2. *c.* 37. "That all insurances, interest or no interest, or without further proof of "interest than the policy itself; all gaming or wagering policies, or wherein the insurer shall have no benefit of salvage, *are void* (except in the case of privateers, or ships in "the *Spanish* or *Portugal* trade): and no re-assurance shall "be lawful, except the former insurer is insolvent, a bankrupt, or dead."

The object of this statute was to confine policies of insurance to cases only where the parties insuring had a property or interest in the thing insured.

Under it, therefore, it has been decided,

1. "A *certain interest*, though not actually vested in possession, seems an interest insurable under the statute."

It was therefore adjudged in this case, that though the property of all prizes and enemies' goods, captured by the king's

Le Cras v. Hughes. East, 26 Geo. 3 B. R.

King's land and sea-forces, is in the king until condemnation in the Court of Admiralty; yet that the officers and men had an insurable property in things captured, by virtue of the prize act and royal proclamation, declaring the shares and proportion to the captors.

Camden & al. v. Anderson. 5 Term Rep. 709.

But where the policy was on the freight, and the ship had been purchased and registered under Lord Hawkesbury's act (26 *Geo.* 3. *c.* 60.), in the names of Camden and Calvert; these two persons had afterwards taken in two other partners of the names of King and Curtis, but there appeared no transfer or registry of transfer to them jointly with the others, but the declaration averred interest in the first count, in Camden, Calvert, and King, and in the second, in them together with Curtis, and there was no other count averring any interest in Camden and Calvert only; it was held that the plaintiffs could not recover; for as the right to freight resulted from ownership of the ship, and there was no legal ownership in Curtis and King for want of registry, under the act of parliament; these last had no insurable interest, and the policy was therefore void.

Grant v. Parkinson. M. 22 Geo. 3. Park. Insur. 267.

In the case of a valued policy, the insured is bound to prove some interest; but it is not necessary to go into proof of the whole value: but such policy shall not be made a cover for a wager, as to cover an insurance for 2000*l.* by proving to the value of a cable on board: and an uncertain interest, as *the profits of a voyage*, may be insured; and an agreement, that in case of a loss, the profits should be valued at a certain sum, as 1000*l.* *ex. gr.* without any other voucher than the policy, shall be held good.

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2. "In order to make a policy void on the ground of "want of interest, the party must have parted with all his "interest in that which is the object of the insurance."

Hibbert v. Carter. 1 Term Rep. 745.

For in this case it was adjudged, That if the shipper of goods abroad *indorses over to another the bills of lading*, he thereby transfers the whole property in the goods to the indorsee, and he has no insurable interest therein: but if it appears that there was any agreement between the indorser and indorsee, that such *property was not meant to be given* at the time, as if it was only to secure to the indorsee the net proceeds; or that the indorser, in case of a loss, was to pay the sum for which the goods were assigned, he there has an insurable interest.

Thelluson v. Fletcher. Dougl. 301.

3. *Policies upon foreign ships* are not within the statute, on account of the difficulty of bringing witnesses from abroad to prove the property. Therefore in insurances on foreign ships, the policy is proof of interest sufficient; and in the case of a judgment by default, the plaintiff need only prove the subscription to the policy by the defendant.

4. "The

4. "The object of the insurance should be real property, "and not be made to cover a contingent interest or advan- "tage."

As where the plaintiff gave to the defendant 20*l.* on an agreement, that if a certain *India* ship reached *China* that season, the plaintiff was to receive nothing: but if the ship lost her passage that season, the defendant was to pay to the plaintiff 1000*l.* on the ship's arrival in the river *Thames*. The ship lost her passage, and the plaintiff brought his action for the money; but it appearing that he had none or little interest on board, it was held to be clearly a wagering policy, and void under the statute. Kent v. Bird, Cowp. 583.

5. "The property required by the statute to be in the "insured, must be such as *may legally be exported and im-* "*ported:* for the policy shall never be allowed to cover an "illegal adventure."

Therefore, where the policy was on a neutral vessel, the *Bella Juditta*, a *Venetian* ship, from *London* to the *Grenades*, with liberty to touch at *Cork* and *Madeira* for a lading: the ship sailed for *Cork*, where she took in a lading of provisions, the property of subjects of the king of *France*. At the time of her taking in the lading of provisions *an embargo was subsisting* in the *port* of *Cork*, laid on all manner of provisions: notwithstanding which she sailed with clearances for a neutral port, but in fact for an enemy's. It was adjudged that this voyage, being in breach of the embargo, was a criminal act; and so being illegal, the plaintiff could not recover. Delmada v. Motteaux., M. 25 Geo. 3. Park. Insur. 234. 3 Ed. [64]

So where it was made *on goods* from *London* to *New York*, which were *prohibited* to be landed there by statute, and the ship was captured: the insurer was held to be discharged as to them, though the clearances from the port of *London* were for another port *(Halifax)* to which the goods might legally have been exported. Johnston v. Sutton. Dougl. 241.

So the insurance of enemies' property is illegal; and the party interested cannot recover on a policy so underwritten. Bristow v. Towers. 6 Term Rep. 35.

6. "The party making the insurance, should *insure his* "*interest in direct terms;* that is, the interest should appear "on the face of the policy: for the court are bound to look "to the instrument, and decide upon that." Per Bull Just. 1 Term Rep. 339.

Therefore where the plaintiffs were *proprietors of the cargo* of the ship *Emanuel* bound from *Falmouth* to *Marseilles*, *but not of the ship itself;* in a former voyage she had been captured, and brought into *Falmouth* by a privateer. In the suits in the Admiralty Court a considerable sum had been expended; which sentence having been in favour of the plaintiff, the expenses were ordered by the Court to be a Kuler Kemp. v. Vigne. 1 Term Rep. 304.

charge on the cargo. These expenses were paid, and it was the intention of the plaintiffs to have covered them by the policy in question: the policy was accordingly made on the goods, but there was on the back of the policy this memorandum: "This insurance is declared to be on money expended for reclaiming the ship and cargo, valued at the sum which shall be declared hereafter, the loss to be paid in case the ship does not arrive at *Marseilles*, and without further proof of interest than this policy, warranted free from average, and without benefit of salvage." A loss having happened, it was decided that the plaintiff having insured the event of the ship's arrival in which he had no interest, not the goods on which he had expended the money, it was a wagering policy, and that he could not recover, though the intention might be to insure a real interest.

Carter v. Boehm. 3 Burr. 1905. 1 Black. Rep. 593. S. C.

But in this case an insurance by the governor of *Fort Marlborough* in the *East Indies* was held good; for though called a *Fort*, it is not merely a place of defence, but rather a place for merchandize.

7. By stat. 14 *G.* 3. *c.* 48. "All insurances *upon lives or* "*other events*, without interest in the parties, are declared to "be null and void."

Roebuck v. Hamerton. Cowp. 737.

Upon this statute a policy *on the sex of a person* was held to be void.

Tidswell v. Ankerstein. Peake Cas. N.P. 151.

An executor in trust has been held to have such an interest as is sufficient to enable him to make assurance in his own name, on the life of a person who has granted an annuity to the testator.

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8. By *s.* 5. of stat. 19. *G.* 2. *c.* 37. it is declared, "That "all money to be lent on bottomry or at respondentia on "ships trading to *India*, shall be lent only on the ship or "on the effects on board such ship, and shall be so ex- "pressed in the condition of the bond: and the benefit of "salvage shall only be allowed *to the lender* of the money, "his agents, or assigns, who alone shall have a right to in- "sure the money so lent; and the borrower shall, in case "of a loss, recover no more than the surplus of his prop- "erty, above the respondentia or bottomry bond: and in "case it shall appear that the value of the share in the "ship and effects doth not amount to the sum borrowed, "the borrower shall be responsible to the lender for the "deficiency, with interest for the same and for the assur- "ance and other charges, notwithstanding the ship be "lost."

Glover v. Black. 3 Burr. 1394.

Under this clause of the statute, it has been held, that if the lender of the money on bottomry, or at respondentia, insures it, it must be specified in the policy that it is bottomry

bottomry or respondentia that is so assured, or he cannot recover.

But, however, where the policy was on the *goods, specie, and effects* of the plaintiff, who was also captain on board the ship, and under those words he claimed money expended by him for the use of the ship in the course of the voyage, and for which he claimed respondentia interest, Lord *Mansfield* ruled, that under those words the plaintiff might recover, it being proved *that the usage was to ensure such interest by that mode.* Gregory v. Christie. Tr. 24 S. 3. Park. Insur. 12.

9. By stat. 19 *G.* 2. *c.* 37. *s.* 4. it is further enacted, "That it shall not be lawful to make a *re-assurance*, unless "the insurer shall die, become a bankrupt, or be insolvent; "in any of which cases the insurer, his executors or administrators, may re-assure to the amount that the first insurance was made; but it must be expressed in the policy "to be a re-assurance."

Double assurance differs from a re-assurance, that it is made by the insured, being two policies on the same goods, &c.

In the case of a double insurance, the insured may sue on which policy he pleases, but he shall recover on one only; and on that policy on which he elects to sue, he shall recover the whole loss, and then the insurers on that policy may recover a proportionable part from the insurers whose names are on the second policy. Godin v. London Ass. Company. 1 Burr. 489. 1 Black. Rep. 103. S.

*And under this clause of the act, every re-assurance in this country, whether of foreign or *British* ships, whether by a foreigner or by a *British* subject, is void, unless the first assurer become a bankrupt, insolvent, or die. Andre v. Fletcher. 2 T. Rep. 161. *[66]

10. A further regulation with regard to policies of insurance is now made by stat. 25 *G.* 3. *c.* 44. which enacts, "That no policy shall be made upon ships, goods, or merchandize, without inserting therein the christian and surname of the person interested therein, if they reside in "*England*, or the names of their respective agents, who "shall effect the same: and if the policy be made for any "person not residing in this kingdom, without inserting "therein the name of the agents of such person to whom "such goods, merchandize, &c. did belong, the policy shall "be null and void."

Under the statute it has been resolved, that where the insurance is made for a person not resident in the kingdom, the name of the agent must be inserted in the policy *as agent* to such person, or the policy is void. For the object of the act being to ascertain who was the person for whose use the policy was made, that would not be done unless the name of the person who effected the policy was inserted as agent. Pray v. Edie. 1 T. Rep. 313.

Sp

Wilton v. Iveaston. Sittings after Mich. 1787. Park. Ins. 18.

So where the policy was in the name of Mr. Wm. Wilton and the rest of the owners, Mr. Justice *Buller* held the policy to be void; for the statute having directed that the names of the parties interested should be inserted in the policy, it was necessary that the names of all the parties interested should be inserted.

"As by the statute, property is required in the insured "when the policy is made, so it seems that it must subsist "in the person at the time the loss happens, or in some one "possessed of the same interest."

Sadlers' Company v. Badcock. 1 Wils 10.

For where the lessee for years insured an house for a time longer than his term: the term expired, and the house was afterward burned before the time insured for expired, after which the lessee assigned the policy to the landlord: it was adjudged, that the lessee could not assign the policy to the lessor, so as to enable him to sue on it: for the insurance is an indemnification of the person insuring, and if his interest is gone when the loss happens, the policy is void and at an end.

11. By statutes 30 *G.* 3. *c.* 33. and 34 *G.* 3. *c.* 80. "insur- "ances are prohibited against losses on policies on slaves, ex- "cept perils of the sea, piracy, insurrection, capture by the "king's enemies, barratry, or by fire; and no loss or damage "is recoverable on account of the mortality of slaves by nat- "ural death or ill treatment, or against loss by throwing "them overboard, or any cause whatsoever."

Tatham v. Hodgson. 6 T. Rep. 656.

Under these statutes it was decided, that where the ship on board which a cargo of slaves had been insured, had met with very bad weather, which had lengthened her voyage from nine weeks to six months, in consequence of which the provision fell short, and the slaves died for want of proper provisions; and the declaration averred the loss to be by perils of the sea. It was held not to be so, but from natural death of the slaves; so that the insured could not recover.

Molloy. de Jur. Mar. & Nav. 257.

12. With respect to the form of words used in a policy, the destination of a ship must always be expressed in the body of the policy when the insurance is made: and therefore a policy on a ship from London to——, leaving a blank for the place of destination, is void.

Kewley v. Ryan. 2H. Black. 343.

So though it is usual to express the ship and captain's name, on board which goods insured are to be carried, it has been held, that an insurance on goods on board a ship or ships generally is good, and the insured may recover on any ship on which the goods have been shipped.

Plantamour v. Staples. 1 T. Rep. 611.

So it has also been held, that the owners of goods, by shifting them from one ship to another, does not preclude them from recovering for an average loss arising from the capture

capture of the second ship, if they acted from necessity, and for the benefit of all concerned.

And note, That though in the case of gaming or wagering policies the insured cannot recover, yet if such a policy is underwritten by an insurer and the premium paid, *the insured cannot recover back the premium so paid*, on the ground that it was paid without consideration, because that in case of a loss, the insurers would not be chargeable: for in such case, *potior est conditio defendentis*.

Lowry v. Bourdieu. Doug. 451. Andre v. Fletcher. 3 T. Rep. 266. S. P.

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13. By stat. 6. *Geo.* 1. *c.* 18. Power is given to establish two corporations or companies for the purpose of insurance.

And by the same statute all other corporations or partnerships, for the purposes of effecting insurances, are prohibited, and declared to be void.

"Under this statute, it has been held, That it extends to "all cases where two or more persons enter into a partner- "ship or agreement to underwrite policies of insurance, "though done in the name of one of them only, and that "all such policies are void."

For where the facts were, that the two bankrupts had engaged in a partnership for the insurance of ships, but which was carried on in the name of Robertson only, and he at the time of his bankruptcy had paid a much larger sum for the losses on the several policies underwritten, than he had received for premiums; and he now brought his action, to be reimbursed the overplus against the assignees of the other person's estate. It was adjudged, that the partnership being illegal, as prohibited by stat. 6. *Geo.* 1. *c.* 18. the plaintiff therefore could not recover.

Mitchel & al. Ass. of Robertson v. Cockburn, Ass. of Tyler. 2 H. Black. 379. Sullivan v. Graves. Sittings after Easter, 1789. Park. Ins. 8.

The two corporations established under the above statute are the Royal Exchange Assurance Office and the London Assurance Office.

Vid. post Booth v. Hodgson.

2. What shall avoid a Policy.

This is either, 1st, By matter previous to the making of the policy, or, 2dly, By matter subsequent.

1st, *By matter previous to the making of the policy.*

As 1st, By a false representation. 2dly, By a false warranty. 3dly, By a concealment of circumstances.

"As to the 1st, It is a general rule, that a false representa- "tion of any matter, before the policy has been signed, shall "avoid it as against the insurer, on the ground of fraud."

As where the broker, in procuring an insurance on a ship from *New York* to *Philadelphia*, stated, "that she had been seen in the *Delaware* on the 11th of *December*," whereas in fact she was lost on the 9th of *December*. It was held that

M'Dowell v. Fraser. Dougl. 247.

that this misrepresentation avoided the policy; for the representation should be true as to all the insured knows; and if he represents facts to the underwriter without knowing the truth, he takes the risk upon himself.

"But the representation must be a *positive assertion.*"

Barber v. Fletcher. Doug. 192.

For where the broker only stated, "that the ship *was expected* to sail in *November* or *December*," though in fact she had sailed before; yet was the policy held to stand good: for it was only stated *as an expectation*, and the underwriter did not inquire into the ground of expection.

Note, It was held in this case, that a representation to the first underwriter on any policy should extend to all the others whose names are on it.

Wilson v. Buckett. 3 Burr. 1561.

Therefore, where an underwriter put his name first on a policy as a decoy to induce others to sign, and on a promise that he should not be sued: this was held to be a fraudulent representation, and to avoid the policy. But that the insurer should return the premium.

2. "But in order to avoid a policy in consequence of "misrepresentation, the representation must be *material* "and at the same time *be false*; for though the representa- "tion be not strictly true, yet if it is more beneficial to the "underwriters, the policy shall be good."

Pawson v. Watson. Cowp. 785. *[68]

*For where the instructions to insure shewn to the underwriters, stated the ship to carry "twelve guns and twenty "men," and in fact she sailed with *a greater force*, the policy was held to be good, the representation being substantially performed, and in favour of the insurer.

"And the construction of the representation shall be "taken according to the import of the words, as used at sea "or common acceptation."

Bean v. Stupart. Doug. 11.

Therefore where the ship was warranted to be manned with *thirty seamen*, this was held to include the ordinary crew, *as officers, boys, &c.* who are deemed to be seamen at the *Customhouse*, *Greenwich* Hospital, and in the distribution of prizes.

Per Lord Mansfield. Cowp. 785.

3. "Such is the case of a representation as affecting the "validity of a policy, but the case of a *warranty* is still "stronger, as it makes part of the policy itself; it must be "strictly and literally performed, and nothing tantamount "will do."

As to which it has been settled,

Pawson v. Watson. Cowp. 787. Kenyon & Ash.

1. That to make a warranty it must be *inserted in the policy*: if it is on a distinct piece of paper, or wafered to the policy, or made verbally, it is but a representation: but it

it may be inserted *in the margin* of the policy, and it then shall be deemed a warranty; so where it was wrote transversely on the margin of the policy, it was held to be a warranty.

ton v. Berthon. Doug. 12. *In not.*

So in this case, which was a policy on the ship *Juno*, from *Liverpool* to *Africa*, *in the margin was this memorandum*, "*Sailed from* Liverpool, *with fourteen six pounders, swivels, small arms, and fifty hands, or upwards.*" The ship sailed from *Liverpool*, with only forty-six hands on board; but in six hours after her sailing, arrived at *Beaumaris* in *Wales*, where she took in six hands more, which continued with her during the voyage; and it was further found that the vessel, until and when she took in the six hands, was equally safe as after. It was nevertheless decided, That this was a warranty, which warranty must be strictly and literally complied with, and that therefore the policy was void.

De Hahn v. Hartley. 1 Term Rep. 343.

2. "The warranty is only of the circumstances stated "*at the time of underwriting the policy*, that they are then "true; and if so, the insurers are liable for all future "risks."

*As where the insurance was made on a *Dutch* ship, from *L'Orient* to *Rotterdam*, warranted a neutral ship and neutral property; this was the case when made, and when the ship sailed, *viz.* on the 11th of *December* 1780; *during her voyage* war was declared against the *Dutch*, the power to whom she belonged, *viz.* on the 20th of *December*, whereby she ceased to be neutral. She was captured on the 25th of *December*, and the underwriters insisted that the warranty was to extend to the whole of the voyage: but it was held, that the warranty only extended to the time when the policy was made, and when the risk commenced, and so that the insurer was liable.

Eden v. Parkinson. Doug. 705. *[69]

But where the plaintiff insured a ship and cargo warranted to be neutral property, it was proved that the ship and property was not neutral when the policy was made. It was adjudged, that the insurer was discharged, *though the loss did not happen by capture*, but from having foundered; for the warranty was false at the time of making the policy, and so the policy void.

Woolmer v. Muilman. 3 Burr. 1419. 1 Black. Rep. 427. S. C.

However, where the policy was on goods from the lading of them, lost or not lost, "*warranted well the 9th of December*, 1784;" at the trial it appeared that the policy had been underwritten between one and three o'clock of that day, and that *the ship had been lost at eight o'clock that morning.* It was adjudged, That the warranty was complied with, by *the ship's being safe at any time of that day*, and the defendant, the insurer, therefore liable.

Blackhurst v. Cockell. 3 T. Rep. 360.

3. "For

3. " For a warranty is so absolute, that nothing but a " performance of the conditions of it shall discharge it: and " it shall be absolute under every circumstance as against " the parties."

1. *As against the Insured.*

Hore v. Whitmore. Cowp. 784.

For where a ship was warranted to sail from *Jamaica*, on or before a particular day, and before that day *was prevented from sailing by an embargo*, the insurer was held to be discharged, though the terms of the policy *could not* be performed.

Bond v. Nutt. Cowp. 601. 2 Res.

So if she be detained beyond the day she is warranted to sail, by any cause whatever, as by dangerous weather, want of repair, the enemy being off the port, or such; in all these cases the insurer is discharged, by reason of the non-performance of the warranty.

Vezian v. Grant. G. Hall Sit. East. 1779. Park. Insur. 326.

So where the warranty was on a ship warranted to sail *after* the 12th of *January*, 1770, and she sailed *before that* *[70] *day*, it was ruled by Mr. Just. *Buller*, that the insurers were not liable.

" So where there is a warranty to sail with convoy, the " same strictness is required; and in such case, *sailing with* " *convoy*, means sailing under the command of that officer " who is appointed by government for that purpose; and " if a ship does not so sail, though the loss may not arise " from the capture by the enemy, but from other causes, the " insurer shall notwithstanding be discharged."

Hibbert v. Pigou. East. 26 G. 3. Park. Ins. 339.

As where the insurance was on the ship *Arundel*, Capt. *Mann*, from *Jamaica* to *London*, warranted to depart with convoy. On the 25th of *July*, she sailed from *Morant-Harbour* to *Kingston*, where she met the *Glorieux*, Capt. *Cadogan*, who was going from thence to *Bluefields*, where Admiral *Graves* was to take the convoy under his command, and convoy them to *Great Britain*. Captain *Mann*, on arriving at *Kingston*, asked for sailing orders from Capt. *Cadogan*: he said that he could not give them, not having himself joined the Admiral, but that he was sure that the Admiral would not sail from *Bluefields* until the *Glorieux* arrived; however, if he should have sailed, that he (Capt. *Cadogan*) would give Capt. *Mann* sailing orders, and take every care of the *Arundel*. They proceeded together to *Bluefields*, and arrived there on the 28th of *July*, when they found that Admiral *Graves* had sailed two days before. The *Arundel* and *Glorieux* then sailed together, the latter firing guns, *and acting as convoy* in every respect. On the 7th of *August* they came up with the fleet under the Admiral, off *Cape Antonio*: the *Arundel* was afterwards lost in the month of *September*, in consequence of a violent storm. After a verdict for the plaintiff, and a motion for a new trial, it was resolved,

resolved, that sailing with convoy was a sailing with the force appointed by government, which in this instance had not been the case, and that so the warranty had not been complied with.

So where the policy was on a ship from *London* to *St. Sebastian*, in *Spain*, *warranted to depart with convoy for the voyage*: there was no direct convoy to *St. Sebastian*, but there was a convoy to *Bilboa*; which was in her course to *St. Sebastian*. She arrived safely at *Bilboa*, and was captured on her way to *St. Sebastian*. On an action brought on this policy it was contended, that the warranty, being for a convoy *for the voyage*, was not complied with, the convoy being to *Bilboa* only; but it was resolved, that the word *convoy* meant such a convoy as was appointed by government, and here sufficiently satisfied the policy, and the plaintiff recovered. D'Equino v. Bewick, 2 H. Black. 551.

So where the insurance was on a ship from *Africa* to the *West Indies*; on the 2d of *October*, she sailed from the coast of *Africa* and was taken on the 6th by an *American* privateer: a letter had been received the 20th of *February*, which mentioned that the ship was well and had sailed the 2d of *October*: this was communicated to the plaintiffs, who in consequence wrote to their brokers to get the insurance in question. In that instruction to the brokers, they said nothing of the time of the ship's sailing, but said, "we wish you would get this insurance on the ship, as she *is rather long*, and we do not wish to run so great a risk." They afterwards instructed the brokers to inform the underwriters, that the ship was on the coast of *Africa* on the 2d of *October*, but said nothing of her sailing: the policy was dated the 21st of *March*. Lord *Mansfield* directed the jury that this was a concealment of circumstances: and they found for the defendant. Ratcliffe v. Shoolbred. G. Hall. Trin. 1780. Park. Ins. 181. Park. Ins. 188. S. P. [71]

2. As against the Insurers.

"The same literal adherence to the terms of the policy "shall charge them."

As if a ship warranted to sail by a certain day, before that day breaks ground on her voyage home, though she is put back by stress of weather, or recalled by an embargo, the policy remains good, though she does not sail afterward till long after the day: for she has performed the terms of the policy, by beginning her voyage at the day. Bond v. Nutt. Cowp 61. Dougl. 353. S.C. 3 Res

So where the policy was on the ship *Leghorn Galley*, *warranted to sail from* Jamaica *on or before the first of* August, she sailed from her port *Savanna de la Mar* on the first of *August*, with a full cargo and her clearances on board, and proceeded to *Bluefields*, which is the general place of rendezvous, and Earl v. Harris. Dougl. 342.

where she expected a convoy; but was there detained by an embargo fourteen days. This was held to be a sufficient inception of the voyage to answer the terms of the policy, and the insurer liable, the ship having been taken afterwards by a privateer.

3. "The third case in which a policy may be avoided, by "matter previous to the signing of the policy, is by *a con-* "*cealment of circumstances*, affecting the ship, &c. at the "time of making the insurance."

As to this it had been decided,

Per Lord Mansfield, 3 Burr. 1909.

1. "That the keeping back any circumstance in his 'knowledge by the insured, to mislead the underwriter "into a belief that the circumstance did not exist, or to es- "timate the risk, as if it did not exist, is a fraud, and avoids "the policy. And the case is the same though the sup- "pression happened through mistake, and without any frau- "dulent intent; for the insurer is deceived."

Seaman v. Fonnereau. 2 Stra. 1183.

On the 25th of *August* the defendant underwrote a ship from *Carolina* to *Holland*. It appeared that on the 23d of *August*, the agent for the plaintiff had received a letter, wherein it was mentioned, "That the writer was in company with the ship in question on the 12th of *August*, and that at twelve at night he lost sight of her all at once, and that the captain of her the day before had complained that she was leaky." This letter was not communicated to the underwriter. In fact the ship continued her voyage until the 19th, when she was taken by the *Spaniards*, and there was no pretence of any knowledge of an actual loss when the insurance was made, and it was made in consequence of a letter received from the plaintiff, dated the 27th of *June* before. But the concealment of the letter was deemed a fraud on the insurer, and he was held to be discharged.

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Da Costa v. Scandrut. 2 P.Wms. 170.

For whatever accounts the insured or his agent have received of the loss or other circumstance in which the safety of the ship is concerned, these should be communicated to the underwriter, or the policy shall be void.

Hodgson v. Richardson. 1 Black. Rep. 463.

And on the same ground, a concealment of the true port of lading from whence the ship sailed, was held sufficient to avoid the policy; she having been loaded at *Leghorn* and put into Genoa, where she lay five months, and the policy was made after the five months expired *on the ship at and from Genoa*, and these circumstances not communicated.

Per Lord Mansfield. 3 Burr. 1910.

2. "But the insured may be innocently silent as to "grounds open to both to exercise their judgments on; "therefore he need not mention what the insured knows "already, or what he ought to know; what he takes "upon

"upon himself to know, or what he waives being in-
"formed of."

As if an underwriter insures a private ship of war, he need not be told the secret enterprise it is destined for, because he knows some expedition is in view; and from the nature of the contract he waives the information. Ibid.

So where the defendant underwrote a policy against the taking of *Fort Marlborough* in the *East Indies*, by the enemy for one year, on the part of the governor. In an action on the policy it was resolved, 1st, That it was no concealment of circumstances that the state of the fort and fortifications was not made known to the insurer. 1st. Because he had made no inquiry to this particular; and 2dly, That it was the risk of being attacked only that was insured; and 2dly, It was resolved, that it was not necessary to make known to the insurers the governor's opinions and surmises on the probability of an expedition against it, which were mere surmises, and equally lying within the knowledge and conjectures of the insurers themselves. Carter v. Boehm. 3 Burr. 1905. 1 Black. Rep. 593. S. C.

So where the policy was on a *Portugueze* ship, at and from *Madeira* to *Jamaica*, which was captured and carried into a *French* port, and condemned on the ground of having an *English* supercargo on board, it was insisted for the underwriter that it should have been disclosed to him that the supercargo was *English*. It was further insisted on, on the ground that an ordinance had passed in *France*, declaring ships with supercargoes of nations at enmity with *France* to be lawful prize. But per Lord *Mansfield*, If both parties are ignorant of it, the underwriter must run all risk: if the defendant knew of such an edict, it was his duty to inquire if such a supercargo was on board. It must be a fraudulent concealment of circumstances that shall vitiate a policy; so the plaintiff had judgment. Mayne v. Walter. B. R. East. 22 G. 3. Park. Ins. 195. *[73]

"For the underwriter is bound to know every cause "which may occasion natural perils: *as the difficulty of the* "*voyage*, *the season*, *&c.* as also all *political dangers*, as the "probability of a declaration of war or peace: and he "therefore cannot screen himself under an ignorance of any "of these circumstances." Per Lord Mansfield in S. C.

As where a ship was insured before war was declared, *but when it was daily expected*, and she did not sail till after war had been declared; it was adjudged that there was no concealment here as to the underwriter, and that the policy remained good. Planche v. Fletcher. Dougl. 249. 2 Res.

"So the insurer is bound to *know the course of trade*, and where a loss happens, if in the common course of that trade, he is liable." Doug. 494.

As where the policy was on *a ship to* Labrador *on the fishery, and the cargo until discharged*. The ship arrived, but the Noble v. Kennaway Dougl 492.

the cargo was not discharged for a considerable time, and during that time the ship was cut out of the harbour by a privateer. It was objected, that this delay and neglect in the ship's discharging her cargo should avoid the policy. But it being proved to be *the usage and course of trade* to discharge the cargoes of ships by degrees, and in that manner; the court held, that the underwriter was bound to know it as such, and that it must be deemed to be within the policy, and the underwriter be liable.

S. C.

2dly, It was resolved, That though the question on the particular branch of trade to the place in question might *be new*, yet that the course and practice of the same trade to a different place, was good and admissible evidence. As the mode of trade and fishing at *Newfoundland* was admissible evidence as to the same trade to *Labrador*.

Salvador v. Hopkins. 3 Burr. 1707. [74]

So where the insurance was upon an *India* ship, chartered in the common printed form, in which is a clause, that the Company *may detain* the ship in *India* for twelve months, otherwise she is to be allowed to return within a stated time. The ship in question was detained, and the insurance was made, without notice that she had been so detained, but made merely on the charter-party. A loss having taken place, the insurers contested the payment, on the ground that, having no notice of the detention, it was a concealment of circumstances; but it being proved that such detention was the common course of the *India* trade, was within the terms of the charter-party, and so a risk then in contemplation, and that the fact of detention might be known at the *India* House. The court on these grounds held the insurers liable.

Park Ins. 220.

To this head may be added, that which is necessary to constitute every valid contract of insurance, namely, that at the time of making the policy, the ship must be sea-worthy; and if the ship has any latent defect, though it was unknown to the assured at the time of making the insurance, still the underwriter is discharged; for the assured is bound to know that she is sea-worthy. But if she is so at the time, if she ceases to be so however soon after her sailing, the insurer is liable.

These are the cases in which policies of insurance have been declared to be void, from matter existing before the making of them.

2dly. How Policies may be avoided by matter subsequent.

"As to this it is a general rule, that the terms of the policy "are to be strictly adhered to; for any variation from the "risk insured, discharges the underwriter."

"Upon

" Upon this ground, where a certain voyage is insured, " *any deviation from the direct course* of that voyage, as de- " scribed in the policy, avoids the policy."

Therefore, where a ship was insured from *Leith* to *Gottenburgh*, and back again to *Leith* and *Cockenzie*. The ship performed her outward-bound voyage, and, on her return, put into *Cockenzie* before she put into *Leith*, and was then stranded and lost. *Cockenzie* is nearer to *Gottenburgh* than *Leith*; but there is no settled course of trade, and the harbour of *Cockenzie* is more insecure than that of *Leith*. It was adjudged, that as there was no settled course of trade, that by the words of the policy, the vessel ought to have gone first to *Leith*; and that so there was a deviation.

Beatson v. Haworth. 6 T. Rep. 531.

1. " As to what deviation shall avoid a policy, it has been " held, that it is not material whether the loss of the ship be " the consequence of the deviation or not, nor for *what* " *space of time* it was made, nor *how far* out of the direct " course; for every the smallest deviation changes the " voyage intended to be insured, and discharges the under- " writer."

As where the policy was on a ship bound from *Dartmouth* to *Liverpool*, she sailed from *Dartmouth*, but put into *Loo*; *Loo* was a place she must of necessity pass by in the course of her voyage, but it was not mentioned in the policy; and though it was proved that no accident whatever happened in going in or coming out of *Loo*, and that she was lost after she had cleared it, and got to sea, yet Just. *Yates* ruled this to be a deviation, and to avoid the policy.

Fox v. Black. Sum. Ass. Exeter. 1767. MSS.

So where the ship *George*, bound from *Cork*, in company with two other vessels, left the convoy to make a cruise during the night, being a strong ship; though this was but for a few hours, Lord *Cambden* held, that from the moment a ship *deserted the direct voyage*, that the policy was discharged."

Cock v. Townson. Park. Ins. 298. [75]

2. " But an intention to deviate will not avoid the " policy, if a loss happens while the ship was in her direct " course."

For where the ship was insured from *Carolina* to *Lisbon*, and from thence to *Bristol*, and the captain had taken in salt, which he was to deliver at *Falmouth* out of his course, before he went to *Bristol*, he was taken in the direct tract to both places, before the dividing point; the insurance was held to stand good as against the underwriters.

Foster v. Wilmer. 2 Stra. 1249.

For where a partial loss happens in the case of an insurance, and in the same voyage a deviation is afterwards made, the insured shall recover for such loss, for the policy is only discharged *from the time of the deviation.*

Green v. Young. Salk. 444. 2 Lord Raym. 840. S. C.

3. " But

3. " But if in fact the ship does not proceed at all on the " voyage insured, though she may be in the track of it, yet " shall the policy be discharged."

Wooldridge v. Boydell Dougl. 16.

The insurance in this case was on a ship from *Maryland* to *Cadiz :* she was taken in the *Chesapeak ;* all her clearances were *for* Falmouth *and a market*, and the place of capture was in the course for both places, and before the dividing point. In an action against the insurers, it was held, that as the evidence of her clearances shewed her destination to be different from that insured, it was not the voyage the insurer meant to underwrite ; and he was therefore discharged.

Way v. Modigliani. Trin. 27 G. 3. 2 Term Rep. 30.

For the policy should attach when the ship sets out on her voyage, or it cannot after. So that if she sails before the time fixed in the policy, it never attaches.

Jolly v. Walker. G. Hall East. Sitt. 1781. Park. Insur. 299.

4. " In the case of merchant ships *with a letter of marque.*" It was resolved in this case, that they might *give chase* to an enemy's ship without being guilty of a deviation, but that they *could not cruise ;* for such might lengthen the risk to an immoderate length.

5. " A deviation is excusable in the following cases :"

1st. " In the case of necessity." As if a ship is driven out of her course by stress of weather, or if she becomes leaky, she may go out of the direct course to another port to repair.

Guibert v. Redshaw. Guildh. Sitt. Hill. 1781. Park. Ins. 301. Motteaux v. London Assur. Comp. 1 Atk. 545. S. P.

*As where the policy was on a ship from *Rochelle* to *Africa ;* she sailed for *Africa*, and three days afterwards she met with a gale of wind which strained her seams, and split her mizen-mast and rigging. The crew came in a body to the captain, desiring him to make some port for repair : the captain finding that she had too litte ballast, complied and put into *Lisbon*. This being a deviation from necessity to repair, the insurer was held to be liable.

*[76]

Lavabre v. Wilson. Dougl. 271.

But in such case it must appear that such deviation was clearly through necessity. For if it was used for any trading, or such like purposes, it is not an excusable deviation. And therefore if the ship is compelled to leave her direct course by such necessity, she must proceed to such place of safety in direct course, and in the shortest possible time.

Harrington v. Halkeld. Guildh. Sitt. Mich. 1778. Park. Ins. 346.

Therefore where the policy was on a ship warranted to sail with convoy for *England* to *St. Kitt's ;* she sailed with convoy, but was separated by a storm. It was proved by the captain, that after the separation he did all he could to get to *St. Kitt's*, and directed his course so as to meet the convoy crossing, but that in that course he was taken by an

American

American privateer, this was held to excuse the deviation, and the insured recovered.

" For to make a deviation criminal, and so discharge the " underwriter, *it must be done voluntarily.*"

For when a ship went out with a letter of marque, insured from *Bristol* to *Newfoundland*, and having taken a prize, the sailors rose and compelled the captain to leave his course for *Newfoundland* and return to *Bristol*. In an action against the insurers, who set up a deviation in their defence, it was resolved, that it was excused by reason of the force used against the captain, which he could not resist, and so fell within the case of necessity, which had been always admitted as an excuse.

Elton v. Brogden. 2 Stra. 1264.

2dly, For the sake of *greater security* a deviation is excusable.

As where a ship deviates something from her course for the sake *of meeting with a convoy*; this shall not be deemed a deviation sufficient to discharge the insurer. But the ship should not *wait for a convoy*; for the underwriter is supposed to estimate the time his risk continues in rating the premium, and therefore it must not be prolonged, unless through necessity.

Bond v. Nutt. Cowp. 601. 4 Res.

3dly, " Where the known *usage of trade* admits it."

*For where a ship was insured from *London* to *Nantz*, allowed to touch at *Ostend*, and all her clearances were *to Ostend only*, it being proved to be the usage of the trade to clear for one port and go to another, to avoid the *French* duties, and this known to be the established mode, the policy was held to be good against the underwriter.

Planche v. Fletcher. Dougl. 240. Bond v. Gonsales. Salk. 445. S. P.

*[77]

2. " But though such strict adherence is required to the " terms of the policy, yet some latitude is admitted as to " the usage and course of trade, *so as to take in losses not* " *within the strict letter of the policy.*

For where the defendants had underwritten a ship to *China* in the usual form, against all losses during the voyage. When the ship reached *China* she was unrigged, and the rigging brought on shore, where by accident it was consumed by fire. The insured brought their action to be repaid their damage, and the defendants refused to pay, on the grounds that it was less *on land*, and so not within the policy. But it being proved that it was *the established course of the trade* to unrig the ship, the plaintiff recovered.

Pelly v. Royal Exchange Assur. Company. 1 Burr. 341. & Cas. Ibid.

So where the action was on a policy " on the goods, specie, and effects of the plaintiff, on board a ship from *London* to *Madras* and *China*, with liberty to touch, stay, and trade at any ports whatever." When the ship arrived at

Gregory v. Christie. Tr. 24 G. 3. Park. Ins. 49.

at *Madras*, she was too late to go to *China* that year, upon which she was employed by the Council to go to *Bengal* for rice; in which voyage she was lost. It was contended that this loss was not within the terms of the policy, which gave a liberty to stop, stay, and trade at places *in the course of the voyage*; but it being proved to *be the usage of the East India trade* for ships too late for *China* to be so employed, the plaintiff recovered.

Farquarson v. Hunter. Hill 25 G. 3. Park. Ins. 50.

And in a later case, where the words were the same as in the last policy, except that "*to trade*" were wanting, the Court held the same construction on the ground of usage.

3. "When any act is done by the insured inconsistent "with the nature of the insurance when first made, and "contrary to the direction of the insurers, that shall avoid "the policy."

Denison v. Modigliani. 5 Term R. 580.

As where the policy was made 2d of *February* on a ship and cargo from *Liverpool* to *Oporto*. She sailed, but was driven back, and being about to sail again on the 12th of *February* the insured were desirous to put guns on board the vessel and to take out a letter of marque; but doubting whether this would not avoid the policy, they applied to the underwriters for their permission, and they allowed her to take guns on board for her protection, but refused to allow her to have a letter of marque. Notwithstanding this she did take a letter of marque, and was captured in her voyage. It did not appear that she had used the letter of marque or deviated at all, and it was stated that it was only intended to be used on her return home. The Court held that this policy was completely vacated by having taken the letter of marque.

Moss v. Byrom. 6 Term R. 379.

But where the assured upon a trading voyage took out a letter of marque, but there was no certificate (which was requisite to its validity,) and it was done in order to encourage seamen to enter, and there was no intention of using it, this was held not to avoid the policy.

4. "To determine therefore what shall be an adherence "to the terms of policies, the several *constructions on them* "are to be attended to."

Molloy de Jur. Mar. & Nav. 255.

And 1st, If a merchant insures a ship generally, as of such a burthen; this assurance shall take in the ship only, and not any of the merchandize on board her. But in insuring the cargo, it is not necessary to specify the particular goods; it is sufficient to say on the wares, merchandizes, &c. on board such a ship.

Tonge v. Watts. 2 Stra. 1251.

*[78]

*So where the plaintiff made an insurance on a ship and freight, the ship was then careening before she took in her lading, and a tempest having arisen, she was lost: it was adjudged

adjudged that the plaintiff should only recover for the loss of the ship, but not for the freight, the goods not being actually on board, so as to make the plaintiff's right to freight commence.

But in this case which was a valued policy, and the insurance on freight valued at 1500*l.* ; in fact, only 500*l.* of freight was on board when the ship was driven from her moorings and lost, but goods to the whole amount of the freight were lying on the quay ready to be shipped when the accident happened ; the Court held the assured entitled to recover to the whole amount notwithstanding the last case, for there was an inception of the contract, part of the goods being on board. Montgomery v. Eggington. 3 Term R. 361.

So where the action was on an open policy on freight, at and from *London* and *Teneriff* to any of the *West India* islands, *Jamaica* excepted. The ship sailed from *London in ballast*, and was captured before her arrival at *Teneriff* where she was to take in her cargo. The charter party was "to depart out of the river *Thames*, and to proceed to *Teneriff* and there to load, and to take in on account of the freighters 500 pipes of wine for the *West-Indies*, at 35 shillings a ton freight." It was adjudged, that the moment the ship sailed from the *Thames*, the contract for the freight had its inception, and the policy attached, and thereby gave to the plaintiff, the insured, his right of action. Thompson v. Taylor. 6 Term R. 478.

2. If a ship is insured *from* a port, the insurance does not commence until the voyage is begun, so that the insurer is not liable for a loss *in port* ; but if she once breaks ground, though driven back into port, the insurer is liable for a loss, for the voyage was begun. But as insurance *at and from* a port, includes losses while in port. Molloy. 295

3. If *goods* are insured on board any ship, the policy shall "only cover such goods as are *stowed in the usual manner in* "*the hold*, or other place of safety, *or as things of merchan-* "*dize.*"

For where the policy was on the captain's goods for six months ; and the loss proved, was of *goods lashed on deck*, the *captain's clothes and the ship's provisions* : it was proved in evidence, that these things were *subject to a greater risque*, and not considered as within the general term of *goods*, unless specially insured by name, and a greater premium given, Lord *Mansfield* ruled that the plaintiff could not recover. Ross v. Thwaite. Sitt. Hill. 16. G. 3. Park. Ins. 23.

4. If goods are insured on board any ship and she becomes leaky, if the master and supercargo take them from that ship, and put them on board another, the policy is discharged, unless there are these words, "the goods laden to be carried by such a ship, *or any other*, until safely landed ;" in which case the insurers are liable. Molloy de Jur. Mar. & Nav. 256.

5. " When an insurance is made *for any given time*, that " time must be *successive*, not at different periods."

Syers v. Bridge. Dougl. 509.

As in this case the insurance was on a letter of marque for six weeks, this it was held should be for six successive weeks, not part at one time and part at another.

Waples v. Eames. 2 Stra. 1243.

*[79]

*6. The insurance is generally for such a voyage or time, and *until moored for twenty-four hours in safety*. Under this clause, where a vessel came in, but before the twenty-four hours expired, was ordered out again to perform quarantine for fourteen days, during which time she was lost, it was adjudged to be within the risque insured, she not being moored twenty-four hours in safety, and the insurer liable.

Minett v. Anderson. Peake's Cas. N. P. 211.

So under a similar clause in a policy on a ship bound to a foreign port, and previous to such ship's arrival at her destined port an embargo had been laid on all *English* vessels in that port, and she on entering it was detained as a prize, and her crew made prisoners of war, the assured was held to be entitled to recover, though no guard was put on board for three days.

Angerstein v. Bell. Sitt. after Trin. 1795. Park Ins. 35.

So where a ship had arrived at the wharf where she intended to unload on the 12th of *January*, and was laid on the outside of the tier there being no room to lay her on the inside, and her sails were unbent and anchors out, and she was lashed to another ship, and so continued till the 19th, when several ships and a quantity of ice having drifted against her, she was set adrift and wholly lost ; it was ruled by Lord *Kenyon*, that on the 12th she was moored in safety, and as the loss had not happened within 24 hours after, the loss was not within the policy ; and the plaintiff was nonsuited.

Barrass v. London Assurance. Sitt. Hill. 1782. Park. Ins. 43. Camden v. Cowley. 1 Bl. Rep. 417.

7. " Where a ship is insured *from and to* such a port, the " rule is, that the outward risk determines *on the ship* in " twenty-four hours after its first arrival at the first port, but " that the outward policy *on goods* continues till they are " landed."

Leigh v. Mather. Sitt. after Mich. 1795 G. Hall. Park. Ins. 38. Espin. N. P. C. 3: P.

Therefore where the action was on a policy of insurance on a ship at and from *Jamaica* to *London* ; the ship had also been insured from *London* to *Jamaica* generally : she arrived at *Jamaica* and got into a port, and was lost before she had delivered all her outward-bound cargo, which she was to have done at other ports of the island : it was held, that the outward risk determined when the ship had moored at any port of the island, and did not continue till she came to the last port of her delivery.

Gordon v. Morley & Campbell v. Bourdieu. 2 Stra. 1265.

8. If a ship is insured to go with convoy, she is warranted by that policy to go to the place where the convoy is. and if in her way thither she is captured, the insurers shall be charged.

So

So where a ship sails in pursuance of signal to join a convoy, but is prevented by bad weather from receiving her sailing orders, yet it is a sailing with convoy within the policy. Victoria v. Cleve. 2 Stra. 1250.

9. That clause in policies of insurance, "Corn, fish, salt, fruit, flower, and seed, to be free from average unless general, or the ship stranded," means, that only in these two cases of a general average, or the stranding of the ship, the insurers shall be liable to such damages as arise from thence; but all other partial losses are excluded. Wilson v. Smith. 3 Burr. 1550. 1 Black. Rep. 507. S. P.

"And upon these it has been decided, that where any "of these things specifically come to port, though dam-"aged so as to be of little or no value, the insurer is dis-"charged."

For where the insurance was on a cargo of peas from *London* to *St. Augustine*, and they were so damaged as to sell for less than the freight by three fourths; it was held that by their arrival, notwithstanding the injury, the underwriter was discharged. Mason v. Skurray. Sitt. Hill. 1780. Park Ins. 113. & Cas. ibid.

10. Where the policy was on a certain ship *in any lawful trade*, this shall be construed, "any lawful trade *in which she may be employed by the owners*," and if she is so employed, and the master is guilty of barratry *by smuggling*; yet shall the insurers be liable, if barratry was a risque insured against. Havelock v. Hancell. 3 Term Rep. 277.

11. "It may, however, be taken as a general rule, that "though policies are by the judges construed literally, they "shall not be so extended as to embrace objects not within "the terms or meaning of the policy."

Therefore where the insurance was *on the ship Tartar*, at and from *London* to *Newcastle* and *Marseilles*, and at and from *Marseilles* to her discharging port in the *West Indies*. On her voyage, she being distressed, bore away for *Minorca*; the captain then had her surveyed, in doing which much time was lost; and the action was brought to recover the *wages and extraordinary provisions* expended during the detention for those repairs. It was held, that such could not be recovered under a policy on *the ship*, and the plaintiff was nonsuited. Fletcher v. Poole. Sitt. East. 1789. Park. 52.

4. Of Total, Partial, and Average Losses; and how far the Insurer is liable for each. [80]

1. "After notice of loss of the ship insured, the insured "may abandon to the insurers and recover for a total loss, "and then the insurers stand in their right to recover as "much of the property as they can." Molloy de Jur. Mar. & Nav. 257.

"But

2 Burr. 697. "But the principle of abandonment has been restrained "in many instances for fear of fraud, and only is allowed "where the loss is of such a nature as appears to be a total "one; for the merchant, where there is only an average "loss, shall not be allowed by abandoning it to make it a "total one; for abandonment shall only be allowed in case "of a total loss."

Cazalet v. St. Barb. Pasch. 26 G. 3. B. R. "And so it should be made in the first instance: for if the "insured endeavour to recover part of the property, they "shall not afterward be allowed to go for a total loss."

Mitchell v. Edie. Hil. 27 G. 3. And in these cases following the insured has been allowed to abandon.

Goss v. Withers, 2 Burr. 983. Where the ship was by bad weather obliged to *throw great part of her cargo overboard, was afterwards captured by the enemy;* and being recaptured and brought into port, her cargo was found of little worth, and the ship damaged. It was held that the insured might abandon and recover for a total loss.

Milles v. Fletcher. Dougl. 219. So where the ship had been taken and recaptured, and the salvage and repairs amounted to so considerable a sum, that the captain deemed it for the benefit of the owner to sell her in a foreign port; the insured recovered for a total loss.

M'Masters v. Shoolbred. Espin. Cas. N.P. 237. But where a ship insured had been captured and brought into a neutral port and sold, and the captain bought her for the benefit of the owners, it was ruled that they shall only be entitled to recover on the policy, the sum paid by the captain and what was expended in her outfit, and could not recover for a total loss.

Boyfield v. Brown. 2 Stra. 1065. So where the cargo of the ship insured received so much damage, that *the value of the part saved came to less than the freight;* the insured were allowed to recover for a total loss.

Hamilton v. Mendez. 2 Burr. 1214. 1 Black. Rep. 277. S. C. 2. But the mere capture of a ship, if afterwards retaken without any damage, will not give the insured a right to abandon; but the plaintiff on such a policy can only recover an indemnity according to the nature of his case at the time of the action brought, or at most at the time of the offer to abandon.

Dean v. Dicker. 2 Stra. 1250. In this case the ship insured was captured and carried into the enemy's port, where she remained eight days, when she was cut out by an *English* ship. The Court held, that the ship being so long *infra præsidia* and in the enemy's power, it was a total loss as against the insurers. But according to Lord *Mansfield's* doctrine in the case of *Goss* v. *Withers*, it seems to be undecided what capture shall be construed a total loss.

[81]

3. "The

3. "The loss to charge the insurer, must happen during "the existence of the policy: for though the *cause of the loss* "happened during the existence of the policy, yet if the "loss did not actually happen till it expired, the insurers "are not liable."

For where the policy was for six months on a ship to *New York*, and during her voyage she sprung a leak, and by the opinion of the carpenter and crew, thereby received her death's wound. This was on the 1st of *January*, and on the 3d the policy expired: she was however kept above water till the 7th, when she sunk. The underwriters were held to be discharged, though she received her death's wound during the existence of the policy; the loss not having happened till after the policy had expired.

Menetone v. Dunlop. Pasch. 23 G. 3. B. R. *Cit.* 1 Term Rep. 260.

"For by no *reference or retrospect* shall the insurer be "charged, when the risque has been run during the exist- "ence of the policy, and the voyage performed which was "insured."

For where the master during the voyage insured, had been guilty of barratry, by smuggling brandy, &c. hovering near the coast; the ship arrived safe in the *Thames*, but was twenty-seven days afterwards seized, under an information for smuggling, and restored on payment of the exchequer composition of 230*l*. The insured offered to abandon, but the Court held this not to be a loss within the terms of the policy; for so, after many voyages and final settlements between the parties, might a source of litigation be opened.

Lockyer v. Offley. Pasch. 26 Geo. 3. B. R. 1 Term Rep. 252.

4. "The insurer shall be liable for no loss, *unless it falls* "*exactly within the terms of the policy.*"

Therefore, where the insurance was on *the ship Dumfries*, at and from *London* to *Africa*, and during her stay and trade there, and from thence to her ports of discharge in the *West Indies*. In her voyage from *Africa* she touched at *Barbadoes* where an embargo was laid on all the ships. The captain applied for leave to depart, but was refused; in consequence of which he attempted to sail by night, but was pursued and brought back, and his crew taken from the ship, which was thereby detained four months, and the action was to recover the additional *wages* and the *charges for provisions* during the detention. But it was decided, that this being a policy on the ship, was on the *body, tackle, and furniture* of her, not on the voyage or crew, and that therefore the plaintiff could not recover.

Robertson v. Ewer. 1 Term Rep. 127.

[82]

So where the policy was in the same terms as in the last case, on a cargo of slaves from *Africa* to the *West Indies*, and there was a memorandum, that the assurers were not to pay for mortality by mutiny, unless the same amounted to 10 *per cent.* on the first cost of the ship, outfit, and cargo. They did

Jones v. Schmoll. Trin. 25. G. 3. Term Rep. 180. in not.

did mutiny ; some were shot, some died of their wounds, others in despair jumped overboard, and were drowned, and some drank salt water, of which they died after the ship came into port. It was held, that for those who were shot or perished of their wounds, as arising from mutiny, the insured should recover, but not for those who perished from collateral circumstances.

Eden v. Poole. Sitt. Hill. 1785. Park. Ins. 61.

These are the two last decided cases: but before these, it had been decided on the same principles, that in the cases of a policy on a ship, that the assured could not recover for any expenses of demorage, or such like charges.

Brough v. Whitmore. 4 Term Rep. 206.

Though under the term "furniture" of the ship, it was adjudged that the insured might recover the *stores and provisions* of the ship.

Hoskins v. Pickersgill. Sitt. 23 G. 3. Park Ins. 56.

But where the insurance was on the tackle and furniture of a *Greenland* ship, it was adjudged that the insured could not recover: for the *lines and tackle* used in the fishery could not be recovered under the policy.

5. "Where the insured takes the goods into his own pos-"session, the insurer then becomes discharged."

Sparrow v. Carruthers. 2 Stra. 1236.

Defendant underwrote a policy on goods of the plaintiff *till the same should be landed safely in London:* the ship arrived in port, and the plaintiff took out the goods and put them into his own lighters, from whence they were lost: it was adjudged, that the plaintiff having taken his goods out of the possession of the captain of the ship, into his own, that the insurer was discharged.

Hogg v. Gouldney, Guildh. Sitt. Term 1745, Park. 133.

6. Where a partial loss is settled, it is usual for the underwriter to indorse the policy in these terms: "Adjusted this loss at *l. per cent.*," and signed it. And where such an indorsement is made, it amounts to an absolute promise to pay; and in such case, the owner need only prove such indorsement, and shall not be called upon to give any proof of the loss, or of any of the circumstances respecting it.

Note, In settling losses this rule is observed,

Lewis v. Rucker. 2 Burr. 1167.

If the policy is a valued one, and part of the goods are damaged, the average is settled by this rule: The insurer shall pay to the insured the same proportion of the valued price that the loss on the goods at the port of sale bears to the price they might have been sold for, if no such loss had happened: as if the goods undamaged would sell for 20*l.* *per* hogshead, but in consequence of the damage produce but 15*l.*, here they have suffered a loss of 5*l.*, or one-fourth of their value, therefore one-fourth of the valued price must be made good by the insurer.

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5. Of

5. Of the several Losses within the Terms of the Policy.

Losses within the terms of the policy are, principally, 1st, Losses by perils of the sea. 2dly, By capture and the detention of princes or people. 3dly, By barratry.

1st, "Losses by perils of the sea include every accident "that can happen to a ship by the violence of the winds "and waves, thunder, lightning, tempest, or stranding, "from such causes, &c." Park. Ins. 83.

But where a vessel was by stress of weather driven on the coast of *France* and there captured, it was ruled by Lord *Kenyon*, that this was a loss by capture, and not by perils of the sea, for that had she been driven on any other coast she would have been in perfect safety. Green v. Elmslie Peake's Cas. N. P. 212.

Under this head it is ranked, that where a ship insured has not been heard of for a great length of time she shall be presumed to have perished by perils of the sea. Park. Ins. 63. post. Green v. Brown. 144.

2dly, With respect to loss by capture, it is completely settled, That as between the insurer and insured a ship is to be considered as lost by capture though she never be condemned or carried into the port of the enemy, and the insurer is liable to pay the whole of the loss. If afterward recovered, the owner is entitled under stat. 29 *Geo.* 2. *c.* 34. *s.* 24. paying the proportion there settled as salvage. Park. Ins. 66.

So where the question of the legality of the capture was doubtful, it was ruled by Lord *Mansfield*, that a sum paid *bona fide* as a compromise to prevent the ship being condemned as prize, was a loss to be borne by the insurers. Berens v. Rucker. 1 Black. Rep. 313.

"With respect to loss by the detention of princes, the "assured may abandon in case merely of an arrest or an "embargo by a prince not an enemy." Per Ld. Mansfield. 2 Burr. 696.

"And as to losses by the detention "of people," that "means, the ruling power of the country where the ship "may happen to be."

For where the policy was on a ship laden with corn, which was forced into *Elly* harbour in *Ireland*, and a great scarcity then prevailing there, the people rose and took possession of the ship from the captain and crew, to compel them to sell the corn below the invoice price, and having weighed the anchor, the ship drove on a reef of rocks, and was lost. The loss was stated in the declaration to be "by the unlawful restraint and detention of people unknown." This was held not to be a loss within the meaning of the policy, it not being by the ruling power of the country. Nesbit v. Lushington. 4 Term Rep. 783.

So if a foreign power seize a neutral ship at sea, and carry her into port to search for enemy's goods, all the costs and Salloucci v. Johnson. Park. Ins. 79.

and charges which arise from thence are chargeable against the underwriter.

Rotch v. Edie. 6 Term Rep. 413.

So where the insurance was on a ship "at and from the port of *L'Orient*," in the common form against restraints of princes, people, &c., and while the ship was in port, the persons exercising the ruling powers in *France stopt the vessel by an embargo*; this was adjudged to fall within the description of a loss by the detention of princes and people, the embargo having continued; and that the insured might abandon, and recover for a total loss.

3. "Barratry is one of the risques insured against in all "policies of insurance; and is a loss occasioned by any fraud "of the master or mariners."

Knight v. Cambridge, 1 Stra. 581.

1. As where the master attempted to run the ship out of port without paying the duties, and was stopt, whereby the ship was forfeited: this was adjudged to be barratry, and to subject the insurers, as done *per fraudem & negligentiam* of the master.

2. "It is essential to barratry that the wrong be committed by the master and mariners *against the owners*; and "therefore if the owner is privy to, or the cause of it, the "insurer is not liable, for it is not barratry"

Nutt, assignee of Hague, v. Bourdieu. 1 Term Rep. 323.

As where the policy was on the ship *Rachette*, from *London* to *Rochelle*; *Le Grand* was owner of the ship, and having obtained goods from *Hague* the bankrupt (which *Hague* insured) went himself on board the vessel, and by his contrivance carried the vessel to a different port, and so defrauded *Hague*. This was held not to be barratry, *Le Grand the owner being privy to, and concerned in the fraud.*

Ross v. Hunter. 4 Term Rep. 33. Ibid. S. C. post. 84.

But where a person *acts as master of a ship*, and is treated with as such, and he commits an act of barratry, it shall *not be presumed that he was owner* so as to discharge the underwriters: if in fact he was so, proof of that must lie upon them.

3. "So that to constitute barratry, it must be done *with-out the knowledge of, and against the interest of the owners.*"

Stamma v. Brown. 2 Stra. 1173.

For where the defendant underwrote a ship to *Marseilles*, and she was afterwards advertised to carry goods to *Genoa*; and the agent gave out that she should go to *Genoa* before she went to *Marseilles*, which the defendant insisted should not be done, as being contrary to the terms of the policy; however, she sailed first for *Genoa*, and in return to her course to *Marseilles*, was blown up. The plaintiffs attempted to make this out to be barratry in the master: but the Court held, that it *being premeditated, and for the benefit of the owners*, could not be construed barratry; but was a deviation which discharged the insurers.

But

But where the ship is chartered from *London* to *Seville*, the master left his course and went to *Guernsey* on a smuggling business for his own benefit *without the knowledge* of the owners: the night after she left *Guernsey* she sprung a leak, and put into *Dartmouth*: when refitted she sailed for *Helford*, where it was always intended she should take in her provisions; but in her way received such damage that she could not proceed; it was adjudged to be barratry in the master, and the insurer liable: for the loss was in fact the *consequence* of the deviation for a fraudulent purpose. Vallejo v. Wheeler. Cowp. 143.

"Therefore a loss arising from a deviation by the cap-"tain for *fraudulent purposes of his own*, shall be deemed "barratry."

As where the ship *Live Oak* was put up at *Jamaica* as a general ship, and freighted by the plaintiff for *New Orleans*, she sailed on her voyage, and dropped anchor at the mouth of the *Mississippi*, and the captaid went up to *New Orleans* in his boat, and on his return, without pursuing his destination, stood away for the *Havannah*, and was never after heard of. It appeared that he had a private adventure of negroes on board, which not being able to dispose of at *New Orleans*, he had gone to the *Havannah* in quest of a market: it was contended for the defendant, the underwriter, that this was a mere deviation, and so should discharge the underwriter: but it was resolved, that it being for a fraudulent purpose of the captain's own, that that should make it barratry. Ross v. Hunter. 4 Term Rep. 33.

6. Of Apportionment and Return of the Premium.

1. "If a policy is underwritten, and the risk not run, "though it has arisen from the fault of the insurer, yet the "insurer shall return the premium: but if the risk has once "commenced, the insured shall not have a return of the "premium if they do not choose to proceed on the voyage, "*unless the contract and voyage is of a divisible nature.*" 3 Burr. 1240. Cowp. 668.

As where the ship was insured from *London* to *Halifax*, warranted with convoy from *Portsmouth*; she sailed from *London*, but when she reached *Portsmouth* the convoy had sailed. It was adjudged that the underwriter should return the premium, deducting the value of the risk from *London* to *Portsmouth*; which in this case was one-half *per cent.*; for the voyage was divisible in its nature, *viz.* from *London* to *Portsmouth*, and from thence to *Halifax*. Stevenson v. Snow. 3 Burr. 1237.

"But where it is not so divisible, there shall be no ap-"portionment of the premium."

* As where the insurance was on the ship *Parker Galley*, at 5 *per cent.*; 2 *per cent.* to be returned if she sailed with convoy: she sailed with convoy only to a *certain latitude*. Lilly v. Ewer. Dougl. 72.

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This, it was held, should not make the insurer return part of the premium; for the contract was entire and for the whole voyage.

2. "And though the contract may consist of many parts, "yet it may be entire; and the premium in such case shall not be apportioned."

Bermon v. Woodbridge. Dougl. 751.

As where a ship was insured "at and from *Honfleur* to "*Angold*, during her stay there, and thence to *Domingo*, "and home;" premium 11*l*. It was held, that though there were several parts of this voyage, yet that the contract was entire; and if the risque was once begun, that there should be no apportionment of the premium.

Tyrie v. Fletcher. Cowp. 666.

So when the insurance was on a ship "at and from *London* to any port *for* 12 *months*." This was held to be one entire contract, and that the premium should not be considered as so much a month: so that the ship being taken before the twelve months expired, that there should be no apportionment of the premium.

These are the principal cases of express contracts which are objects of this action. I shall subjoin a few other cases, reducible to no general head.

Jones v. Hill; 3 Lev. 268.

1. A parson may recover against the former incumbent who has been guilty of dilapidations, the sum expended by him in necessary repairs, by action of *assumpsit*.

Radcliffe v. Doyley. 2 Term Rep. 630.

So an action lies by *a prebendary* against his predecessor or his executor, for dilapidations suffered in the prebendal house in the predecessor's time: but where by the constitutions of the church of *Ely*, the receiver was to require the prebendaries to repair their houses; and if they neglected, to repair them and deduct the expense from the salaries: but *the church was to find the materials in all cases*. It was resolved, that in such an action for dilapidation, the successor could only recover *the expense of the workmen in making the repairs*, not the amount of the materials, which the church was to find.

Martyn v. Hynd. Dougl. 137. Same parties. Cowp. 437.

2. Where a rector or incumbent of a parish *gives a title* to a person to be ordained to the bishop, appointing him his curate under the title, he undertakes to continue him and pay him a salary until he shall be otherwise provided for by ecclesiastical preferment, or be lawfully removed. And it was further resolved, That under such title, 1. The curate is not removable without a just cause. 2. That while the rector continues in the parish, he is bound to pay the curate the salary he engages for; and he can recover it in this action: but in case the rector is preferred to another parish, the obligation ceases, and the salary is not recoverable. 3. The election of the curate *to a reader-*

*[86]

ship

ship is not such a preferment as shall exempt the rector from the obligation he undertakes in the title.

3. If the sheriff levies money on a *fi. fa.* and does not pay it over to the plaintiff, he may recover it in this action, as levied to his use. — Williams v. Crey. Salk. 12.

4. This action will lie to recover the value of a masquerade, or such like ticket, at the suit of the person who passed it. *Note*, The objection to this action was that it should be *trover*. — Longchamp v. Kenny. Dougl. 132.

5. So where a shipwright had repaired a ship, which by accident was burnt while in dock, yet was he allowed to recover in this action the amount of the repairs. — Menetone v. Athawes. 3 Burr. 1592.

6. It was decided in these cases, that this action lies against an executor or administrator having sufficient assets, to recover *a legacy*, upon a promise to pay in consideration of assets. — Atkyns v. Hill. Cowp. 284. Hawkes v. Saunders. Ibid. S. P. 289.

However this may be, where there has been an express promise, it is now settled, that an action will not lie against an executor or administrator for a legacy, on the ground of his having assets sufficient to pay: for it would prevent the interposition of a court of equity, which would cause a settlement to be made on the wife, where the legacy was left to her. — Deeks & Ux. v. Strutt. 5 Term Rep. 690.

7. *Assumpsit* will lie for money had and received, *though the lender of the money has taken a pledge for his security:* for he shall be presumed to trust to the personal security of the borrower as well as to the pledge, unless there appears a special agreement to discharge the person. — South Sea Company v. Duncomb. 2 Stra. 919.

8. "It is usual to try the title to an office by this form of "action—the party claiming the office bringing an action for "the fees. So if a person is entitled to an office with fees "annexed, and a stranger intrudes into the office, and re-"ceives the fees, an action for money had and received lies "to recover them."

"But they must be fees constituting the known and ac-"customed perquisites of office, and which the officer can "claim by law."

For where the action was brought by the plaintiff who was belfry and church sexton of the cathedral of *Salisbury*, to recover several sums of money received by the defendant, for shewing the church, the plaintiff claiming to have the exclusive right of shewing the church; it was ruled by *Buller*, Justice, That the action could only be maintained where the fees were annexed to the office, known and accustomed; and it appearing that the fees which the action was brought to recover, were gratuities voluntarily given by strangers who came to see the cathedral, he nonsuited the plaintiff, which was afterwards confirmed by the Court of King's Bench. — Boyter v. Dodsworth. 6 T. Rep. 681.

Having

Having thus considered what will maintain this action, I shall now proceed to consider

2. WHAT CONTRACTS WILL NOT SUPPORT AN ASSUMPSIT.

1. " This action being founded either on an express " contract or an implied undertaking, whenever the pre- " sumption of such contract or undertaking is excluded, as " where it appears that money for which the action was " brought was paid, *without the consent* of the person sued, " there this action will not lie."

Stokes v. Lewis. 1 Term Rep. 20.

As in this case, where it appeared to be the custom of the parishes of *St. Vedast* and *St. Michael le Quern*, to elect a sexton jointly, and each parish to pay a moiety of the salary. *St. Michael's* had claimed a right to have a separate sexton, and gave notice to that effect to the parish of *St. Vedast*. *St. Vedast's* paid to the sexton last chosen, and then in possession, the *whole salary*; and then brought an action against *St. Michael's* for the moiety: it was adjudged that it [87] could not be maintained, for the money was paid clearly *against the consent* of the parish of *St. Michael*; and so there could be no undertaking implied.

Thorp v. Howe. Per Holt. Salk. MSS. Buller N. P. 130.

So when in *assumpsit* for goods sold, the evidence was, that the plaintiff's servant had sold the goods to the defendant, who was to give him half price, *which the servant was to keep to his own use*, it was adjudged that the plaintiff could not maintain this action, as there was clearly no contract or undertaking to the plaintiff himself.

" So a party cannot *by his own act* make another his " debtor."

Weddel v. Lynam. Espin. N. P. C. 309.

As where the defendant had granted an annuity to the plaintiff, which not having been duly registered under stat. 17 *Geo.* 3. was void; and the action was brought to recover back the consideration money. It appearing that no demand of the arrears of the annuity had been made to the defendants, or any application to them to re-execute the securities, which they might have done, Lord *Kenyon* ruled, that as the annuity had become void by the plaintiff's own act, he should not be allowed to rescind the contract, and avoid the security given, so as to raise a cause of action by his own act or negligence; and as the annuity had never been set aside by an act of the court, nor any application made by the plaintiff either for payment of the annuity, or to re-execute the securities, he held the action not maintainable.

Hob. 106.

2. " A mere *voluntary courtesy* will not support an as- " *sumpsit*."

" And that shall be deemed a voluntary courtesy which " *has been undertaken without a prospect of certain recompence*."

As

As where the plaintiff had done much business for Mr. *Guy* (who bequeathed all his possessions to the hospital) and *had done it in contemplation of a legacy from him.* But being disappointed, after *Guy's* death, he brought this action on a *quantum meruit* for his former service done for Mr. *Guy*, when it was adjudged, that it would not lie, the business having been done not with a view to immediate or certain recompence, but with a view to a legacy.

Osborne v. Govenors of Guy's Hospital. 2 Stra. 728.

So where in an action on an apothecary's bill for medicines and attendance on the testator. It appeared that the plaintiff had never made any regular entries in his books, but had attended the testator in expectation of a legacy, he being related to him; and that he had declared, that had the testator left him any thing, he would never have made a charge. The plaintiff was nonsuited on the above principle.

Hiccox v. Proud. Staff. Lent Ass. 1762. cor. Will. mot. MSS.

"But if there was *any request* made by the defendant, "there the acts shall be presumed and construed to *be not* "*voluntary*, but done in pursuance of the request; and this "action will then lie."

As where the plaintiff declared that the defendant, having killed a man, requested the plaintiff to labour to procure him a pardon, for which he promised him 100*l.* which the plaintiff having performed, it was adjudged that the action well lay, the service on which the action was founded having arisen from the request of the defendant himself.

Lampleigh v. Braithwaite. Hob. 105.

So where the defendant's testator made a promise to the plaintiff that if she would use her influence with her daughter, and induce her to marry him, that he would give her 100*l.* She did so, and the marriage took effect: it was adjudged a sufficient consideration to uphold the action.

Griesly v. Lowther. Hob. 10.

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"But though a request has been made, yet if it was in "consequence of the *offer*, *advice*, *or inducement of the other* "*party*, it will not support this action."

As where in *assumpsit* for money had and received, the defendant gave in evidence that he had paid 20*l.* to the secretary of a foreign ambassador for a protection for the plaintiff, and also charged his costs and expenses in procuring it. The judge directed the jury, that in case they believed that the plaintiff himself had applied to the defendant to get this protection, to allow the sum paid for it; but that in case they believed that the advice to get such protection came from the defendant, then to allow him nothing: and the jury, who knew the defendant to be an artful designing fellow, and the plaintiff an ignorant young man, who had been drawn into difficulties by the defendant;

Aldsworth's case. Reading Ass. 1749. Buller N. P. 153.

ant, who acted for him as his attorney, found for the plaintiff without any allowance.

" And it should seem, that *any thing done in the course* " *of a person's business or employment* shall not be deemed a " voluntary courtesy, but the foundation of a contract."

Jermyn v. Lucas. Per Twisden Norfolk, 1662. Trials p. pais 181.

For where in *indebitatus assumpsit* for carrying herrings, the plaintiff gave in evidence that he was a porter at *Yarmouth*, and that when the herring ships came in, he went *of his own head* and carried such a quantity to the defendant's house. It was held to be good evidence in support of the action.

3. " This action will not lie for breach of agreement " which could not be legally performed, or where the *consid-* " *eration* on which it is founded arises from an *illegal* " act."

Gallini v. Laberie. 5 T. Rep. 242.

Therefore where the plaintiff, who was proprietor of the Opera House, brought his action against the defendant, who was a dancer, on a contract, by which " the defendant undertook to dance at the King's Theatre, at the Haymarket, or such other place as the plaintiff should appoint ;" the action was held not to lie, because it *did not appear that any licence had been granted by the Lord Chamberlain to open and perform at that Theatre, in pursuance of* stat. 10 Geo. 2. c. 28. So that the defendant might have been subjected, as well as the plaintiff, to penalties for so performing.

Allen v. Refcous. Lev. 174.

So where the plaintiff gave to the defendant twenty shillings ; in consideration of which he undertook to beat *J. S.* out of such a close, or to pay forty shillings. He did not do it : whereupon the plaintiff brought *assumpsit* for the forty shillings : and the action was adjudged not to lie, the *consideration being an unlawful act.*

Mitchell v. Cockburn. 2 H Black. 380. Booth, Ass. of Brown, v. Hodgson. 6 T. Rep. 405, & ante 7. S. P.

So where the bankrupt whose assignees were plaintiffs, and the bankrupt whose assignees were defendants, became partners in insuring ships, contrary to stat. 6 *Geo.* 1. *c.* 18. *ante*, which policies were underwritten in the name of the bankrupt only, and he paid all the losses : it was held that the partnership being illegal, no action could be maintained to recover from the defendants their contribution and share of such losses, on policies entered into contrary to the statute.

Webb v. Bishop. Gloucester Ass. 1731. Buller N. P. 16.

So where two boxed for a wager of five guineas, on *assumpsit* for that sum brought by the winner, the action was held not to lie, the act being an unlawful one, as being a breach of the peace.

Thwaite v. Warner. Lond. Sitt. Trin 1773. MSS

So where the plaintiff and defendant had agreed to buy stock and tickets for time and on speculation, which they accordingly did by a broker, and being losers, the plaintiff *paid all the money, and then brought his action against the defendant

defendant for the moiety. It was held clearly that the action would not lie, for the transaction was illegal, as contrary to the stockjobbing acts, and both plaintiff and defendant parties to it, and this action was founded on it; and to allow the party to maintain an action founded on a contract forbidden by the statute, would be to disobey the statute. *Aliter*, If a third person who *is not a party to the illegal transaction*, lends money to be so applied, he may nevertheless recover it (*post. Faikney* v. *Reynous*, Ch. Debt.)

So where the case was, That *Keeble* the plaintiff's testator, the defendant, and a third had been engaged together as partners in certain stockjobbing transactions, from which they having incurred considerable losses, they came to a settlement with *Portis* their broker, who had paid all the differences. At that time *Keeble* paid to *Portis* the whole sum he had advanced, except 81*l.* for which he drew a bill on the defendant, payable to *Portis*, which the defendant accepted. The bill not being paid when *Keeble* died, *Portis* brought an action against the plaintiff his executor, and recovered the amount of the bill; to recover which from the defendant the present action was brought. The defence set up was, That this was a payment of money arising under a contract on a stockjobbing transaction, which was contrary to law, and so could not be recovered; but the court were of opinion, that the plaintiff was entitled to recover according to the following distinction: "That, as between the parties themselves to the illegal transaction, where one party paid money for the other, in pursuance of the illegal contract, *without his directions*, that the money so advanced could not be recovered, for as the party himself was not compellable by law to pay, he should not be obliged so to do that circuitously which he could not be compelled to do directly; but, that if one party *by the other's direction, and with his assent*, pays money which has become due on an illegal transaction, that such money is recoverable by the party who has paid it, as paid by the other's order and direction." That, therefore, in this case, the defendant having accepted the bill, and thereby shewn his knowledge of and consent to the transaction, that he was bound to repay the plaintiffs, who had paid it for him: so the plaintiffs had judgment.

Petrie, Exec. of Keeble v. Hanny. 3 Term Rep. 418.

But where the case was, that the defendant having been engaged in many stockjobbing transactions, had employed a person of the name of *Wilson* as his broker. *Wilson* had paid the differences with his own money; but some disputes as to the amount having arisen between the defendant and *Wilson*, they had agreed to refer the matter to the arbitration of the the plaintiff, who had awarded a sum of money to be paid by defendant to *Wilson*. *Wilson* drew a bill of exchange for the amount on the defendant, who accepted it; and *Wilson* afterwards indorsed the bill to the plaintiff; and upon this bill

Steers v. Fashleigh. Espin. N.P.Cas. 168 Vide S. C. 6 Term Rep. 51.

bill the present action was brought against the defendant, as acceptor. It was held that the transaction upon which the note had been given being illegal, and that known to the plaintiff, in his situation as arbitrator, that he could not recover.

" So though the consideration be *but in part unlawful*, " yet it shall vitiate the action, which is founded on the " whole consideration taken together."

Fletcherstone v. Hutchinson. Cro. Eliz. 199. *[90]

*For where in consideration that the plaintiff (who was a special bailiff) would let a person, whom he had arrested for debt, go at large ; and of two shillings by him then paid to the defendant, the defendant undertook to pay the whole debt, on *assumpsit* brought for the money, it was adjudged not to lie ; for the promise being to the same effect as an obligation, which would be void by stat. 23 *H.* 6. the promise would be so too : and though it was coupled with another consideration of two shillings, yet it being void as to part, it was void as to the whole, the *assumpsit* being founded on the two considerations taken together.

" On this ground, *money won at gaming* would not be re- " coverable." But there is this exception :

Barjeau v. Walmsley. 2 Stra. 1249. Wettenhal v. Wood. Espin. N. P. Cas. 18. S. P.

That where the money was *lent* to play with, but there *was no security as by bond or note, but merely parol*, this was held not a case within the statute ; for there not being the word *contract* in the statute, which only declares all *securities* void, the parliament might think there could be no great harm in a parol contract where the credit was not likely to run high, and that therefore the lender might recover.

Robinson v. Bland. 2 Burr. 1078.

So where the plaintiff declared on a bill of exchange for 672*l.* drawn at *Paris*, by Sir *J. Bland*, on himself in *England*, in favour of the plaintiff, it appeared that the bill of exchange was given for 372*l. won at play, and* 300*l. lent at the time and place of play :* the play was fair, and there was no imputation on the plaintiff: it was adjudged, that the stat. 9 *Ann.* 14. having declared all *securities given for money won at play to be void*, that this bill of exchange was void, for being an entire security, and bad in part, it is bad in the whole ; but *the contract was divisible*, and that part of it which had arisen on a good consideration, that is the money fairly lent, might be recovered.

Bulling v. Frost. Espin. N.P.Cas. 235.

So if the money lost at play be under 10*l.* it may be recovered in *assumpsit*.

" *And though the plaintiff in this action has not been a party* " *to the illegal transaction*, yet where the *assumpsit* has arisen " from it, he cannot recover."

Stackpole v. Earle. 2 Wils. 133.

For where the defendant promised the plaintiff two per cent. on the sum a purchaser to be procured by the plaintiff would

would give for the defendant's place of surveyor of baggage in the port of *London*. The plaintiff did procure him a purchaser, who gave him 1200*l*. and then he brought his action for 24*l*. being two per cent. on 1200*l*. When it was adjudged that the sale of offices being prohibited by stat. 5 & 6 *Ed.* 6. *c.* 16. that the sale was an illegal transaction, and that the *assumpsit* founded on it was void; and so the defendant had judgment. [91]

" But where the *transaction is not in itself unlawful, no* " *subsequent illegal use of the subject of it* shall destroy the " *assumpsit*."

As where the plaintiffs, who were merchants living at *Dunkirk*, sold tea to the defendant there, and which they delivered at *Dunkirk*, though this tea was *for the purpose of being smuggled* into *England*, and that known to the plaintiffs at the time, yet they not being concerned in the smuggling, and it being a fair sale as to them, and good by the laws of the country where they lived, they were allowed to recover the price of the tea in *England*. Holman v. Johnson. Cowp. 341.

But where in this case the plaintiffs were four *partners, three of whom lived in England*, and the fourth in *Guernsey*, and this last sold goods (brandy) at *Guernsey*, put up in a particular manner *for the purpose of smuggling*, though the partners in *England* knew nothing of the transaction. In an action brought for the price of the brandy, the plaintiffs were non-suited. For in this case, the parties were *natives of England*, and the contract was made in contravention of the laws of *England*, and so being in its foundation illegal, could not be supported: and the Court took the distinction between this case and the last; the transaction there was not unlawful, the sale was abroad by persons not subject to the laws of *England and was good when made*, the subjects of a foreign country not being bound to take notice of the revenue laws of this: but here the contract was unlawful, and therefore no action could be maintained on it. Biggs v. Lawrence. 3 Term Rep. 454.

" Though these cases seem to be grounded on the prin- " ciple, that the plaintiffs, being *English* subjects, could " not maintain an action founded on a contract in violation " of the laws of *England*; the principle goes further; for a " foreigner who knowingly assists in the sending goods to " be smuggled into this country, cannot here maintain an " action for the price of them."

As where the plaintiff was a foreign merchant living at *Lisle*, and had sold lace to the defendant, which he knew was to be smuggled into *England*, and for that purpose packed it in a peculiar manner by their direction, and brought this action for the price; the Court held, that the action was not maintainable. Waymel v. Reed. 5 T. Rep. 596. Bernard v. Reed. Espin. N. P. C. 91. S. P.

Clugas v. Penaluna. 4 Term Rep. 466.

So where the plaintiff, an inhabitant of *Guernsey*, sold goods to the defendant in *Guernsey*, which it appeared were to have been smuggled into *England*, and the defendant gave the bills in question, on which the action was brought for the price; it was decided, that the plaintiff could not recover, for they were given for an illegal contract, and to a subject of this country, who therefore could not maintain an action on them.

Bull. N. P. 146.

"However, where a person *has been ignorantly induced* "*by the false representations of another to do an illegal act*, from "which a damage arises to him, he shall recover those "damages from the person who induced him to act in such "manner, on his promise of indemnifying him; for the "act to be done must appear to be unlawful at the time, or "the promise will not be void."

Fletcher v. Harcott. Hutt. 55. Winch. 48.

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*For where the defendant, pretending that he had arrested a person on a commission of rebellion, brought him to the plaintiff's house, and promised to save him harmless on consideration of his keeping such person for one night safe as a prisoner; this person recovered damages against the plaintiff for false imprisonment, and the plaintiff recovered to the amount of them on his promise against the defendant; for the fact might be true, and when the plaintiff so received the person, he did not know that he was doing an unlawful act.

Martyn v. Blythman. Yelv. 107.

But where a person, in consideration that a gaoler would let his prisoner go at large, promised to pay the debt, and save him harmless, this promise was held to be void, for the act must have been known to be unlawful at the time.

"But though the consideration is a *matter not expressly* "*contrary to law*, yet if it *be contrary to the policy of the law* "to support, this action cannot be maintained."

Nerot v. Wallace, Assignee of Collins. 3 Term Rep. 17.

For where the plaintiffs declared, that on the last examination of the bankrupt *Collins*, he being charged by the plaintiffs with having received several sums of money, which he had not accounted for; when the commissioners were about to examine him as to the disclosure of these matters, in consideration that the plaintiffs would forbear from proceeding in such examination, the defendant undertook to pay all such monies, as the bankrupt had received, and not accounted for. In an action on these promises, the plaintiffs had judgment in *C. P.* and now error was brought, when the judgment was reversed, *as being against the policy of the bankrupt laws*; for the creditors had a right to have the bankrupt examined, both as he might disclose effects which they did not know of, and as he forfeited his right to his certificate if he had lost money by gaming, or had given 100*l.* as a portion with a child in marriage; and promises of this nature went to stifle such enquiries, and impose on the Great Seal in granting his certificate.

But

But where a friend of the bankrupt by deed bound himself to pay to all the creditors the full amount of their debts in consideration that they would not proceed with the commission, such was held to be good, and not contrary to the policy of the bankrupt laws. Kaye v. Bolton. 6 Term Rep. 134.

4. "*Assumpsit* will not lie to recover money promised "for doing that which it was *the parties' duty to do without* "*reward*; for it is extortion and illegal."

As where the plaintiff, who was a special bailiff, declared, that having arrested one *Stanton*, in consideration that he would take the defendant and another as bail for *Stanton*, the defendant promised to pay him six guineas and a half, for which this action was brought; it was held not to lie, it being the duty of the bailiff to take proper bail *without any recompence or reward whatever*. Stotesbury v. Smith. 2 Burr. 924. 2 Black. Rep. 204. S. C.

*So where an executor sued out an *elegit*, and a stranger in consideration that the sheriff would forthwith execute it, and of sixpence paid to him by the sheriff, promised to pay him 60*l.* upon which the sheriff executed the writ, and brought his action for the money; it was adjudged that no action lay, as being a consideration against law; for the sheriff is bound to do his duty without reward, and this 60*l.* is no discharge of fees due to the sheriff, being given by a stranger, and not expressed to be in consideration of them. Bridge v. Cage, Cro. Jac. 193. *[93]

5. "Wherever the consideration of the *assumpsit* arises "from a *fraudulent transaction*, this action will not lie."

For where the plaintiffs were suttlers to four regiments at camp, and were to keep eight horses for each regiment, for the forage of which government gave them an allowance of hay and oats, which was to be furnished by the defendant, who was the contractor, and bound by his contract not to commute the allowance of forage for money. In fact the plaintiffs kept but fourteen horses for the whole, and entered into an agreement, that they should not take the whole of the allowance, but that the defendant should retain part, and give a certain allowance of nine pence halfpenny per ration to the plaintiffs for every ration left, this was held to be void, and the money not recoverable; for it was a cheat and fraud on government, who paid for the whole. Willis v. Baldwin. Doug. 433.

"And in order to disable a party from maintaining this "action, it is *not necessary that the cause of action should be for* "*money or property of which others had been defrauded*, as in "the last case; but if in the transaction on which the action "is founded there has been *fraud or deceit practised on third* "*persons*, the action will not lie."

For

Jackson v. Duchaire. 3 T. Rep. 551. Vide Cockshot. v. Bennet, ante, & Jackson v. Lomas, post. S. P.

For where the defendant being about to succeed the plaintiff in a house, which the plaintiff had before occupied, and wishing to have the furniture, the plaintiff agreed to leave it, if she could get a friend to advance the money, as she had not the money herself. She accordingly applied to a friend of the name of *Welch*, and he treated with the plaintiff for the goods, who agreed to take 70*l.* for them, which was paid, and *Welch* took a bill of sale of them to himself; but there was a private agreement between the plaintiff and the defendant, that she was to give 30*l.* more for them, and she accordingly gave two promissory notes for 15*l.* each, on one of which the present action was brought; it was resolved, that the plaintiff could not recover, for the whole transaction was a fraud on *Welch*, who was induced to advance his money, in order to serve the defendant; which, had he known of this, he would probably not have done, as by this means his end might be defeated.

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6. "So this action being an equitable one, cannot be "supported where the *assumpsit* arises from an *unconscientious* "*demand*."

Jestons v. Brooke. Cowp. 793.

As where the plaintiff lent to the defendant a sum of money for the purpose of making a purchase of goods, upon the defendant's note *payable on demand*, and the plaintiff was to have half the profits on the re-sale of the things purchased, over and above the note of hand; the purchase was made and within two hours after, plaintiff made a demand of payment of the note; which being paid, he brought his action for half the profits on the sale of the goods. It was adjudged, that as the note bore interest from the demand, to have interest from that time, and half the profits too, seemed to be usurious, the demand having been made immediately; but if not usurious, that *it was unconscientious*; for the agreement was for half the profits *in lieu of interest*; and the defendant had judgment.

Plumbe v. Carter. Guildh. Sitt. Trin. 1775. MSS. & Cowp. 116.

So where it was proved to be the usage and custom of the trade of gold refiners, that in case goods purchased were not paid for within three months, that the buyer was to pay an halfpenny an ounce per month till the money was paid, this on calculation exceeded the rate of 5 per cent. but was adjudged not to be usury in a case decided prior to this, it not being a loan of money, and being sanctioned by the usage of the trade (*Floyer v. Edwards*, *Cowp.* 112. *& post.*) *Carter*, the defendant in this case, having exceeded the credit, an action was brought against him, to recover the surplus arising from this allowance of an halfpenny per ounce above principal and interest, the defendant having paid the amount of these into court. Lord *Mansfield* was clearly of opinion, that though this transaction was not usury, yet, that it was in fact taking advantage of a person's necessities, and demanding

manding from him beyond legal interest, that it was therefore unconscientious, and not to be recovered.

7. "And so likewise if the consideration is a *frivolous* "or *groundless one*, or if there is *no consideration at all*, this "action will not lie, for *ex nudo pacto non oritur actio.*"

As if *A.* promises to *B*, a sum of money on consideration that *B.* would make him an estate at will, it is a void promise to support this action, for *B.* may instantly determine his will. 1 Roll. Ab. 28.

*So where the plaintiff declared, that whereas the defendant's father had taken the profits of certain lands to which the plaintiff had title, and for which he had filed his bill in Chancery against the defendant, and that in consideration that the plaintiff would withdraw his bill, the defendant undertook to repay the profits so taken, and for which he now brought his action: it was resolved that it could not be maintained, *for there was no consideration*, as the bill in Chancery might have been an unjust one, upon which the plaintiff could have recovered nothing: and besides that, the son was not to answer for the father's wrong. Tooley v. Windham. Cro. Eliz. 206. *[95]

"Upon this ground, a promise of any thing for a *service* "*already performed*, without view to reward, is void. Though "where the service had been done *at the request* of another, "it shall be good to support this action." Beauchamp v. Neggin. Cro. Eliz. 282.

But a promise to a *servant* in consideration of past services has been held to be good. Franklin v. Braddell. Hutt. 84.

And for the same reason, promises to pay merely in consideration of *unspecified forbearance* are void, and will not uphold this action. For the forbearance might be but for an hour, which would be a forbearance, and yet would be an inadequate and frivolous consideration. Lutwich v. Hussey. Cro. Eliz. 19.

Therefore where the consideration is forbearance, the time of forbearance should be a convenient one, and set forth to be left to the jury, who are to judge whether the forbearance was a sufficient consideration to support the action. Treford v. Holmes. Hutt. 108.

"But where a party is *under a moral obligation to do any* "*thing*, a promise made for payment, or a reward for doing "it, shall not be deemed *nudum pactum*, though no other "immediate consideration appears." Bull. N. P. 147.

For where in *assumpsit* for nursing a bastard child, it appeared that the child had originally been put out to nurse with the plaintiff, by the mother's uncle, with whom it continued until the mother's death; that then the father (the defendant) being applied to, promised to pay, on which the action was brought; it was objected that this was *nudum pactum* Scott v. Nelson. Sitt. West. Hall. 4Geo. 3. MSS.

factum, the child not having been taken on his credit. But per Lord *Mansfield*, the defendant was under an obligation to provide for the child; his bare approbation should be construed into a promise, and be sufficient to bind him: so the plaintiff had a verdict.

Watson v. Turner. Bull N P. 147. *[96]

*So where a pauper being taken ill, an apothecary attended her, without any previous order by the overseers; but they afterwards promised to pay; this was adjudged not to be a *nudum factum*, for the overseers are bound to provide for the poor.

Woodford v. Deacon. Cro. Jac. 206. Cro Jac. 213. S. P.

8. *Assumpsit* will not lie where the debt for which the action is brought is *due by specialty*; for the specialty ought to be declared on: therefore it is necessary always in the declaration to set out *for what cause the debt became due (post)* or it will be a sufficient reason to arrest the judgment.

Bulstrode v. Gilborne. 2 Stra. 1027.

Therefore where *by deed under hand and seal*, the plaintiff had appointed the defendant his deputy, as prothonotary to the palace court, and the defendant entered into *articles to account*: the plaintiff brought *assumpsit* for the sums received by the defendant in the office, and the action was held not to lie: for the defendant being bound by deed, the plaintiff had a remedy against him of an higher nature; as here an action of convenant.

White v. Cuyler. 6 T. Rep. 176.

But where a party is indebted by simple contract, *a surety* entering into a deed to secure it does not destroy the nature of the original debt; but the principal may be still declared against in *assumpsit*.

"However, though the cause of action may have arisen "under a deed, yet, if the party's remedy is not by means of "the deed, this action will lie."

Decker & Ux. v. Pope, coram Lord Mansfield Sitt. Trin. 1757. MSS.

As where the surety paid the debt, for which he had joined another in a bond, it was adjudged that he could maintain *assumpsit* for it against the principal, it being money paid to his use.

Toussaint v. Martinnant. 2 Term Rep. 100.

But where the plaintiff joined the defendant as surety for payment of several sums of money, *but took a bond from him for the amount of the sums he was so engaged for*, and which sums he was afterwards obliged to pay, and then brought *assumpsit* for them; the action was adjudged not to lie; for *having taken a bond*, he had relied *on that* as his security, and not on the promise the law would otherwise raise in his favour.

"In the last case, the plaintiff not having relied on the "promise raised by implication of law, could not recover; "but where the money to be paid does not arise under a "deed, but the mode of ascertaining only is settled by the "deed;

" deed ; and there is an express promise to pay the sum so " ascertained, in such case *assumpsit* will lie."

For where in case upon promises, the plaintiff and defendant had entered into articles of partnership, which contained *a covenant to account at certain times*, and this demand arose *on the balance struck*, on such account taking place, which it was proved the defendant expressly promised to pay ; it was objected that the action should be covenant ; but it was ruled by *Buller*, Justice, that the action well lay, as founded on the express promise.

Moravia v. Levi. Sitt. M. 1786. 2 Term Rep. 483.

*And *a fortiori* where a like balance was struck on the dissolution of a partnership, and an account stated, containing that balance, and *also other articles* not connected with it, and which account so stated the defendant promised to pay ; it was held clearly by the Court, that this action lay for it.

Foster v. Allanson. 2 Term Rep. 477. *[97]

So where there is an *express promise to account*, this action will lie ; but the plaintiff shall not in that action be allowed to *go into the particulars of the account*, but shall confine himself merely to the *damage he has sustained from not accounting according to promise.*

Wilkin v. Wilkin. Salk. 9. Bull. N. P. 148.

And therefore in *assumpsit* grounded on a promise to account, misapplication or breach of trust must always be laid in the declaration ; for if a man receives money to a special purpose, it is not to be demanded as a duty until he has refused to apply it according to his trust.

Poulter v. Cornwall. Salk. 9.

However, where a person gave a respondentia bond for a sum of money, and *bound himself by an indorsement on the bond*, that in case the obligee chose to assign the bond to any person, that he would pay the assignee the whole sum without any deduction. This was adjudged to be an undertaking to any assignee to pay the money, and that *indebitatus assumpsit* would therefore lie for the money, by the person to whom the bond was assigned, *as founded on the undertaking, and not on the bond.*

Fenner v. Meares. 2 Black. Rep. 1269.

9. " *Assumpsit* will not lie where the agreement in which " it is founded has been obtained by coercion, or is a fraud " on others."

For where in *assumpsit* upon promises ; the case was, that the defendant having become insolvent, had by deed of trust, dated the 26th of *April*, 1787, assigned all his effects to trustees for the benefit of his creditors, who were to sign it by a given time ; the plaintiffs refused to sign the deed, unless their whole debt was secured to them ; upon which an agreement was entered into by the plaintiffs and the defendant, that the plaintiffs should sign the deed, and receive the dividends under it, and that for payment of the rest, the defendant undertook to recommend cotton to the plaintiffs for sale,

Jackson v. Lomas. 4 Term Rep. 166. Cockshot v. Bennet, ante 5. S. P.

sale, the profits of which should in three years discharge the remainder of the debt; and in case of loss or deficiency, the defendant was to make it good. It then appeared that a loss had in fact happened on the sale of the cottons; for which, and the original debt, this action was brought: it was resolved, that the action would not lie; for it was intended by the creditors who had signed the deed, that on the defendant's assigning over all his property to his creditors, [98] he should become a free man; but the plaintiffs having executed the deed on a private agreement, securing to themselves a further advantage, it was a coercion on the defendant himself, and a fraud on the other creditors, and so could not be supported.

Felse v. Randall. 6 Term Rep. 246.

But where the creditors of an insolvent agree to take a composition for their debts, and execute a deed whereby they are to receive payment of the composition by notes at different dates, if one creditor prevails on the insolvent to give these notes either at a shorter date than those given to others, or to procure a surety to join with him for this payment, this is not a fraud, nor are the notes so given to him void in law; in as much as the debtor is not charged with the payment of any greater sum than that reserved by the composition deed: and the mode of payment only is altered.

Emerson v. Lashley. 2 H. Black. 248.

10. *Assumpsit* will not lie in the courts above to recover the *costs* ordered to be paid by a rule of an inferior court; as here was the case, the costs of a proceeding under an attachment in the mayor's court of *London*.

11. "*Assumpsit* will not lie to recover money which a "party has *voluntarily* paid or in consequence of an action "brought, though the demand was unlawful, and paid with "a reservation of the party's right: as the party should "have resisted the payment: for to allow this would be to "multiply actions.

Brown v. M'Kinally. Espin. N. P. C. 279.

As in this case, where the defendant had agreed to sell the plaintiff all his old iron, except bushel iron, which was of an inferior quality, at 9*l.* a ton: the iron he delivered was mixed iron, and of an inferior quality; and on the plaintiff's objecting to this, the now defendant brought his action: the now plaintiff paid the demand made on him, at the same time telling the defendant that he did it without prejudice, and meant to bring an action to recover the overplus so paid. Lord *Kenyon* said the action could not be maintained; that to allow it would be to try every such question twice; for the same legal ground that would entitle the plaintiff to recover in the present action, would have been a good defence to the action brought against him by the present defendant, at which time and in which manner he should have proceeded; and the plaintiff was nonsuited.

"Though

" Though where a party has paid money by compulsion, " or by taking undue advantage of his situation, in such case " the money may be recovered back." *Ante* 4.

Astley v. Reynolds. 2 Stra. 915.

But where money had been paid by the defendant in this action to avoid a distress made on his goods by plaintiff for rent which was not due, Lord *Kenyon* was of opinion, That such could not be deemed a payment by compulsion so as to entitle the defendant to set it up as demand against the plaintiff, who now sued him on another account; for, that if the demand for rent was unlawful he should have replevied his goods, but that this payment should be deemed to be voluntary.

Knibbs v. Hall Espin. N. P. C. 84.

12. " These are cases in which, on account of the con- " sideration on which the action is founded being bad, the " plaintiff cannot recover; but in those cases, *if the party* " *has paid the money*, on such consideration, *he shall not be* " *allowed to recover it back.*"

As where a lottery-office keeper paid money on an insurance policy, which insurance was against act of parliament. Having brought his action to recover it back, it was resolved, that the insurance being illegal, the Court would not assist him in the recovery of what he had voluntarily paid, and the defendant had judgment.

Browning v. Morris. Cowp. 790.

So if a person pays a debt which has been barred by the statute of limitations, or contracted during his infancy and not for necessaries, or to the extent of principal and interest on an usurious contract, or money fairly lost at play. In none of these cases can the party recover it back; for it was paid thro' a motive of honor and honesty, and the defendant might therefore retain it with a safe conscience, and therefore the law will not compel him to refund it.

Per Lord Mansfield. 2 Burr. 1112.

" But where the money has been paid on an illegal con- " sideration, that is to induce an illegal act, if the service " is not performed, the plaintiff shall recover back the " money."

As where a man gave money to a custom-house officer to run goods, the goods were seized, and the person recovered back his money again.

Quot. Anon. 1 Ld. Raymond, 89.

13. " Though the person who has received any money " from another, may not be legally entitled to keep it, yet " *if it depends on a question of right, which cannot be fairly* " *and completely tried in this form of action*, but may in an- " other; *assumpsit* cannot be maintained for it."

As where the defendant had taken and impounded the plaintiff's cattle as damage feasant, the plaintiff claimed a right of common, but paid the *money charged for the damage*, and then brought *assumpsit* for money had and received, to

Lindon v. Hooper. Cowp. 414.

recover it back, for the purpose of trying the right; the action was adjudged not to lie; 1st, Because that upon the general issue of *non assumpsit* the defendant would not be apprized of the point to which to apply his defence; and 2dly, That the right would not be decided, for it would not appear afterward on the face of the record. The action should have *been trespass or replevin*, in which the right would come in question, and appear on the face of the record.

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Tower v. Wells. Cowp. 819.

So where *assumpsit* for money had and received, was brought to recover back twenty guineas, *given as the difference in the exchange of two horses*, of the plaintiff's and of the defendant's; the defendant had *warranted his to be* sound, but it afterwards appeared to be unsound: on discovering the unsoundness, the plaintiff sent back the defendant's horse, and demanded the twenty guineas; but the defendant said he had sold him, and refused to take him, on which this action was brought, and was held not to lie, for the *warranty* was the point to be tried, *which it could not be in the action in this form:* that is an action *for money had and received;* but the plaintiff might declare in *assumpsit on the express warranty.*

Stuart v. Wilkins. Dougl. 18.

Nightingale, assignee of Metivier, v. Devisme. 5 Burr. 2509. 2 Black. Rep. 684. S. C.

So it will not lie as for *money had and received*, to recover *stock in any of the public funds:* for stock is not money, and the remedy should be by bill in Chancery. This case was to recover back 500*l.* *India* stock transferred to the defendant by the bankrupt after an act of bankruptcy committed.

Noyes v. Price. Sitt Hill. 1776. MSS.

So where the plaintiff, who was servant to the defendant, had found some bank notes, as he said, in the defendant's cellar, he shewed them to the defendants, who said they were not their property; but refusing to deliver them up, the plaintiff brought *assumpsit, for money had and received* against the defendant; and Lord *Mansfield* held, that the action would not lie, it should have been *trover* for the notes.

14. These are the most material grounds of this action. It is however to be observed, that as this action is founded upon promises, it is enacted by the *statute of frauds* 29 *Car.* 2. *c.* 3. that no action can be maintained on a bare promise without a *note in writing* to prove it, in the following cases:

1. "No executor shall be charged in any deficiency or "damage out of his own estate: 2. No person shall be "charged to answer for the debt or default of another per-"son: 3. Nor any one be charged on any agreement in "consideration of marriage: 4. Nor upon any agreement "for the sale of lands, tenements, or hereditaments: 5. Nor "upon any agreement whatever which is not to be carried "into execution within a year from the making thereof, "unless there be a memorandum of the contract, agreement,

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"or

" or undertaking, signed by the parties or their agents prop-
" erly authorised."

Upon these clauses in the statute, the following decisions have taken place.

As to the first I find no determination.

As to the second, the rule is, 1. " That if the defendant " comes only in aid of another who obtains the goods, so " that there is a remedy against both, according to their " distinct engagements, that is a collateral undertaking, " and void without a note in writing; but where the whole " credit is given to the defendant, so that the other is but as " his servant, and there is no remedy against *him*, that is " not a collateral but *an original undertaking;* in which case " a note in writing is not necessary."

Bourkermire v. Darnell. 1 Salk 27. Buller N. P. 280.

As where the plaintiff was lessor to one *Taylor*, who owed him 45*l.* for rent, *Taylor* assigned over all his effects for the benefit of his other creditors, who appointed the defendant as their broker to sell the effects. He advertised a sale, and on the morning of it the plaintiff came to make a distress; whereupon the defendant promised that if he would desist from distraining, he would pay him the whole of the rent. For this rent the action was brought, and the defendant relied on the statute of frauds as an undertaking for the debt of another, and no memorandum in writing. But it was adjudged that the plaintiff having a prior lien on the goods in the hands of the defendant, that they were the fund charged, and to pay out of his fund was an original undertaking by the defendant himself.

Williams v. Leper. 3 Burr. 1886.

So where the plaintiff was a taylor, and being applied to by one *Foster* to furnish him some clothes, refused to deliver them to *Foster* on his own credit, but it appeared in evidence that the clothes had been first sent home to *Foster*, who not having paid for them as he promised, plaintiff prevailed on him to let him have the clothes again, and that soon after defendant came to plaintiff's shop and said, if plaintiff would let *Foster* have the clothes he (defendant) would pay, and that some time after, being applied to for payment, defendant said it was not then convenient to him, but he would pay when a bill which he then had became due. The defendant's counsel insisted it was a case within this statute, but *Eyre*, C. J. held it was not, and that the whole credit was given to defendant.

Croft v. Smallwood. Espin. N. P. C. 121.

2. " But wherever the person undertaking is *jointly inter-* " *ested* with others, though they receive the benefit of his " undertaking, no note in writing is there necessary; for " the undertaking should be *solely* for the debt of another, " which here is not the case."

As

Stephens v. Squire. 5 Mod. 213. Comb. 362.

As where an action was brought against the *defendant and two others*, for appearing for the plaintiff without a warrant, and the defendant promised that if the plaintiff would not prosecute his action, he would pay him 10*l.* and costs. A note in writing in this case was held not to be necessary, *it not being a promise solely for the debt of another*, the defendant being himself originally liable (3 *Burr.* 1898.); but per *Holt*, If *A.* says, do not proceed against *B.* for a *debt*, and I will give you 10*l.*, this would be within the statute.

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3. "So it should seem that a *debt should be absolutely due* "to, or a demand exist by the person to whom the under- "taking is made, to make a note in writing necessary. For "if the third person for whose benefit the undertaking was "given, was never himself liable, the undertaking shall be "deemed an original one in the party who makes it, and no "note in writing be necessary."

Rothery v. Currie. Trin. 21 G. 2. C. B. Buller N. P. 282.

Therefore where, in consideration that the plaintiff would not sue *A. B.* for a *debt* which he owed him, the defendant promised to pay the money due, *viz.* 4*l.* in a week. This was adjudged to be clearly within the statute, and void without a note in writing; for it was for the debt of another, and still subsisting, notwithstanding the defendant's promise, and so was collateral.

Read v. Nash. 1 Wils. 305.

But in this case, where the plaintiff's testator had *brought an action* against one *Johnson for an assault*, in consideration that he would withdraw the record, and not proceed to trial the defendant *Nash* promised to pay him 50*l.* On action brought for this 50*l.*, the defendant relied on the statute of frauds; but it was adjudged not to be within it; for *Johnson was not a debtor*, the cause was not tried, there might have been a verdict for him, so that *never being liable to any certain debt*, this was an original undertaking by the defendant, and not for the debt of another.

Fish v. Hutchinson. 2 Wils. 94.

This is confirmed by this case: for here an action being brought by the plaintiff against one *Vickers* for a *certain sum of money*, the defendant, in consideration that the plaintiff would stay his action, undertook to pay the money; it was held clearly that there should have been a note in writing: for the undertaking was for a *subsisting debt of another*.

4. "*So wherever a person is bound by law to do any act for* "*another, or to procure it to be done, if it is done, though with-* "*out the request of such person*, a subsequent promise by him "to pay is good without a note in writing."

Watson v. Turner & al. Trin. 7 G. 3. in Exchecquer. Buller N. P. 281.

As where a pauper was taken ill, and an apothecary sent for without the knowledge of the overseers of the poor, who attended and cured her, and after the cure the overseers promised to pay him by parol. It was adjudged sufficient to charge

charge them ; for the overseers are bound to provide for the care of the poor, and so shall be deemed originally liable.

5. However, it seems to be difficult to draw any general rule to decide in what cases an undertaker for the debt of another shall be charged, and in what not ; and it must therefore be left to the jury to decide to whom the original credit was given, for on that point all the cases turn. Buller N. P. 281. [102]

But thus far it has been decided :

" That if the person for whose use goods are furnished *is* " *liable at all*, in such case a note in writing is necessary to " charge the party who gives the undertaking to pay."

For where the defendant applied to the plaintiff to serve one *Coulthard*, of *Pomfret*, with groceries ; the plaintiff said he did not know *Coulthard*, nor any person in that part of the world, upon which the defendant replied, " you know " me, and *I'll see you paid* :" the plaintiff said then he would serve him, and the defendant repeated the same words. *Coulthard* ordered goods which were sent, he was made debtor in the plaintiff's books, and they applied to him for payment ; which not being paid, this action was brought against the defendant on his undertaking. The defendant relied on the statute of frauds ; for the plaintiff the distinction in *Jones* v. *Cowper*, *Cowp.* 227. was relied on, *viz.* That where *the promise* to pay for goods delivered to a third person *was made before the delivery*, that it should be deemed an original undertaking, and a note in writing not necessary ; but the Court over-ruled that distinction, and held, that if the party receiving the goods was at all liable, a note in writing was necessary. Matson v. Wharam. 2 Term Rep. 80.

5. Where, to an action brought for goods furnished to a third person, and the defendant *pleaded a tender*, Lord *Kenyon* ruled, that this was an admission of the promise, and took the case out of the statute of frauds. Middleton v. Brown. Peake's N. P. C. 15.

3d. The third case under the statute requiring a note in writing is, " *On agreements in consideration of marriage.*"

As to which it has been settled :

1. " That *promises to marry* are not within the statute. " For the statute relates only to promises or contracts in " consideration of marriage, as to pay money, make a set- " tlement," *&c.* Cock v. Baker. 1 Stra. 34.

As where a father wrote a letter, signifying his consent that his daughter should marry *T. E.*, and that he would give her 1500*l.* On a further treaty he receded from this proposal ; but some time afterward he declared that he would agree to what he had promised in his first letter. It was adjudged that this last declaration had set up the first letter, and was a good promise in writing under the statute. Bird v. Blosse. 2 Vent. 361.

So

Lady Montague v. Sir J. Maxwell for her husband. 1 P. Wms. 618.

So where the defendant before the marriage with the plaintiff, promised her that she should enjoy all her own estates to her separate use, and writings were ordered to be drawn accordingly. After marriage the defendant promised by letter as before. But upon a bill filed against him to compel a performance, he pleaded the statute of frauds, and it was held to be a good bar, as this was clearly an agreement in consideration of marriage, and there was no note in writing before the marriage.

2. "As to what shall be a *sufficient signing* within the "statute, it was decided in this case."

Welford v. Beezley, in Canc. 1 Wils. 118.

That where on a treaty of marriage between the plaintiff and his wife before their marriage, the defendant, who was mother of the plaintiff's wife, promised to give her 1000*l.* and accordingly articles were drawn, to which the plaintiff, his wife and a trustee were parties, for the purpose of settling the 1000*l.* on the marriage: they were read over in the presence of the mother, and executed in her presence, and *she signed her name as a witness.* This was adjudged to be a sufficient signing of a note in writing within the statute.

4. The fourth case under the statute requiring a note in writing is, "*On agreements for the sale of lands or any interest "in them.*"

Per Treby Anon. 1 Ld. Raymond, 182.

"This clause is confined to the sale of things real, as "the lands themselves, and so does not extend to the sale "of *timber* growing on the land, which is a mere chattel, "and so may be sold by parol."

Cases under this head fall more properly to the jurisdiction of the court of Chancery, as they occur on the ground of a bill being filed to compel a sale and complete a purchase.

Clerk v. Wright. 1 Atk. 12.

1. In that court it has been held, That a *letter* from the seller of an estate mentioning his intention to sell the estate, but *not the terms*, is not such a note in writing as is required by the statute.

Hawkins v. Holmes. 1 P. Wms. 770.

2. Plaintiff agreed to sell to the defendant an house for 600*l.*, and by consent an attorney drew a draft of a conveyance, which was sent to defendant to peruse; he made several alterations in it, and returned it to the plaintiff to get it engrossed, and a time was appointed for executing it. Afterwards refusing to perfect the conveyance and pay the money, the plaintiff filed his bill. When it was resolved that this was not such a signing or memorandum in writing as was good under the statute.

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&c.

3. But if the party on the faith of such a sale enters into possession, and lays out money in improvements, a court of equity will order a specific performance.

5. The

5. The fifth case in which a note in writing is required, is on *agreements not to be performed within a year.*

As to this the rule is, "That where the agreement de- 3 Burr. 1281.
"pends upon a contingency, and it does not appear but
"the contingency will happen within the year; nor does it
"appear from the agreement that it is to be performed after
"the year; there a note in writing is *not necessary*, because
"the contingency may happen within the year, and so the
"agreement be performed within that time: but where it
"appears from the whole tenor of the agreement, that it is
"to *be performed after the year*, there an agreement in writ-
"ing is required under the statute."

As where by parol the defendant's testator promised the plaintiff, that if she would come to live with him as housekeeper, that he would give her 8*l. per annum* and *leave her by his will an annuity of* 16*l. a year*. She went and lived with him till his death; when he having failed to make for her the provision promised, she brought her action against the executor; when it was ruled, on the defendant's pleading the statute, that as this depended on a contingency (as the testator might have died within the year) no note in writing was required, and the plaintiff recovered the value of the annuity. Fenton v. Emblers, 3 Burr. 1278. 1 Black. Rep. 353. S. C.

So where the promise was to pay one hundred pounds on the *defendant's marriage*, a note in writing was held not to be necessary. Anon. Comb. 463.

So where it was to pay *on the return of a ship*: for both these contingencies might happen within the year. Anon. Salk. 280.

I shall now, in pursuance of my original division, proceed to the consideration

II. OF ASSUMPSIT WITH REFERENCE TO THE PERSON. [105]

This is in the case,

1st, Of Persons in general.
2d, Of Factors.
3d, Of Agents or Receivers.
4th, Of Masters and Owners of Ships.
5th, Of Servants.
6th, Of Partners.
7th, Of Bankrupts.
8th, Of Executors.
9th, Of Husband and Wife.
10th, Of Churchwardens.
11th, Officers of the Revenue.

1st. Of

Jordan v. Jordan. Cro. Eliz. 369.

1. "It is a general rule, that no person can maintain this "action on an agreement to which he is not a party; for in "such case there can be no contract express or implied."

Crow v. Rogers. 1 Stra. 592.

Therefore where one *Hardy* being indebted to the plaintiff, the defendant undertook to pay *Hardy's* debt to the plaintiff, provided *Hardy* would assign to the defendant an interest which he had in a certain house, and the plaintiff avers that *Hardy* was ready to assign, whereby the defendant became liable to pay the debt so due by *Hardy*. It was resolved that the plaintiff could not maintain this action against the defendant, he being a stranger to the consideration; as the agreement was between *Hardy* and the defendant, and no contract subsisted between the defendant and *him*.

Bourne v. Mason. 1 Vent. 6.

So where one *Parrie* was indebted both to the plaintiff and the defendant, and a stranger was indebted to *Parrie*; the defendant undertook to pay *Parrie's* debt to the plaintiff, on condition that *Parrie* would suffer him to sue the stranger: he did so sue the stranger, and recovered; and then the plaintiff sued him and had judgment, which was arrested: for the plaintiff was a stranger to the consideration.

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"However, where the consideration is a *provision for*, *or* "*to enure to the advantage of a child*, this rule has admitted "of exceptions."

Dutton v. Poole. 1 Vent. 318. 332. Sir T. Jones 103. Rookwood's case. Cro. Eliz. 164. S. P.

For where the defendant's father, who was also father to the plaintiff's wife, was about to cut down 1000*l.* worth of timber off an estate which was to descend to the defendant as a portion for the daughter: the defendant then promised his father that *he* would pay 1000*l.* to his sister provided the father would not sell the timber. In an action brought by the daughter's husband for this sum after the father's death, the plaintiff had a verdict. It was moved in arrest of judgment, that the action could only have been brought by the father, or his executors, as party to the agreement, and not by the daughter, who was a stranger to it: but it was adjudged, that it being a provision for and a kind of debt to the daughter, that *she* should maintain this action though a mere stranger could not.

And a still stronger case was cited in the case from *Vent.* 6. above: Where a physician was promised a sum of money for himself, and another for his daughter, provided he performed a certain cure: it was held, that the nearness of relation gave the daughter the benefit of the consideration performed by her father; and that *she* might maintain *assumpsit* for the money.

"And

" And upon this ground it should seem, that in *assumpsit* " upon promises, general declarations are not sufficient; " they should be made *to the person who brings the action.*"

For where upon a discourse between the father of *A.* and *B.* in relation to a marriage between *A.* and the daughter of *B.* *B.* said, that he would give one hundred pounds *to whoever would marry his daughter with his consent.* *A.* did marry her with his consent, and brought his action for the money: when it was adjudged, that it would not lie on those general declarations, as they amounted not to a promise to the plaintiff himself; though this would now be clearly bad on the statute of frauds. 1 Roll. Ab. 6.

2. In the case of

FACTORS. [107]

1. If a factor sells the goods of a person beyond sea, he may maintain an action in his own name for the price; for the promise shall be presumed to be made to him: and so if he buys goods, the seller may have an action against *him*, for the credit shall be presumed to be given to him: and particularly because it is for the benefit of trade. Gonzalez v. Sladen. Trin. 1 Ann. Salk. MSS. Bull. N. P. 130.

This seems clearly to be the case where there is no interposition of the owner of the goods sold, as to whom, it seems, " That the factor's sale creates a contract between the buyer " and the owner of the goods; and therefore if the factor " sells for payment at a future day, if the owner gives notice " to the buyer to pay him, and not the factor, the buyer is " not justified in paying the factor." This was the doctrine delivered by the chief justice in the case of *Alderton* and *Schrimshire* following: but the jury found against his direction: their verdict was to the following effect: Bull. N. P. 130. 2 Stra. 1182.

That where, by the usage of trade, the factor sells the goods *at his own risk*; that is, at all events answerable to the owner; in such case the owner cannot arrest the money due on the sale of his goods in the hands of the buyer: for the factor, not the buyer, is debtor to the owner of the goods. Schrimshire v. Alderton. 2 Stra. 1182.

But that case seems now not to be law; for in this case, the doctrine before laid down by the chief justice in *Alderton* v. *Schrimshire*, was recognized and admitted. The case was this: In the month of *June* 1783, a cargo of wheat was consigned to the plaintiffs from *Ostend*, and they employed one *Farrer* as their factor to sell it. It was proved, that the factors in this trade have a *del credere* commission beside factorage, and never, except in case of the failure of the factor, make the purchasers' names known to the owners. On the 9th of *June*, *Farrer* sold two hundred quarters of this wheat to the defendant. On the 16th of *June*, *Farrer* handed Escot v. Milward. Sittings after Mic. 24. G. 3.

over and to the plaintiffs the wheat then remaining in his hands, the names of those who had purchased the rest; and among others that of the defendant, *Milward*. On the 20th of the same month *Farrer* stopt payment, and compounded with his creditors, who executed to him a deed to that purpose. On the 21st of *June*, the plaintiffs delivered to the defendant a bill of parcels of the wheat sold by *Farrer*, and demanded payment by his acceptance of a bill to the amount at a month's
[108] date. The defendant refused, and insisted that he had a right to set it off against a debt due by *Farrer* to him. The plaintiffs brought this action; and the doctrine of the chief justice in *Schrimshire* v. *Alderton* was laid down to the jury by Justice *Buller* as the clear law on the subject; and the jury found accordingly for the plaintiffs.

"But the doctrine of this case only applies *where nothing* "*is due to the factor himself:* for he has a lien upon the mon- "ey in the hands of the buyer for any monies due, or for "any engagement he enters into on account of the principal: "for he may bring an action for the price against the buyer; "and it would be no defence for *him* to say, that the prin- "cipal (the owner of the goods) was indebted to him (the "buyer) to the amount of them; for the factor had a prior "right."

Drinkwater v. Goodwin. Cowp. 251.

This was the law as held by Lord *Mansfield* in the following case: In *assumpsit* for goods sold and delivered by the plaintiffs as assignees of one *Dowding*, a bankrupt. It appeared that *Dowding* was a clothier, and employed one *Jefferies* as his factor, who sold to the defendant *Goodwin* the clothes in question, *marked J. Dowding*, before the act of bankruptcy. *Goodwin knew Jefferies to have sold the goods as factor, and he had notice from the assignees not to pay Jefferies:* notwithstanding which he did pay him, and this action was now brought to make him pay the value again to the assignees. It appeared in evidence, that *Dowding* wanting money to buy clothes, That *Jefferies* had joined him in bonds for the purpose of raising it, *on the security of the cloth being sent to him.* It was adjudged by the court that *Jefferies* had a lien upon the cloth and the money in the hands of the buyer, on account of the money so raised (*Jefferies* having paid the amount of the bonds); and that therefore the plaintiffs could not recover.

Walker v. Birch. 6 T. Rep. 258.

But where goods are deposited in the hands of a factor *for a particular purpose*, and he promises to be accountable; in such case he cannot claim a lien for the balance of his general account.

Anon Cas K. B. 514. Per Holt. Ch. Just.

2. Every factor ought to sell for ready money, unless the usage of trade is otherwise; and if *he sell upon trust, without usage to warrant him, he alone is chargeable in case of a loss*; but if the usage be to give credit, then in case he sells to a person

person in good credit, if such person fails, the factor is discharged: but it is otherwise, though the usage to sell is so, if he sells to a person notoriously discredited at the time of the sale: for then in case of a loss he is liable; and so he should sell in market overt, or there is no change of property.

3. As a factor has a lien upon goods consigned to him for his own demands; and as also if goods consigned to him as factor remain in specie, they are not subject to his bankruptcy: so where *bills* have been remitted to a factor for a special purpose, if not disposed of or paid away at the time of his bankruptcy, they shall still be considered as belonging to the principal, and be recovered in this action; but subject, however, to any lien the factor himself may have on them.

Zinck v. Waller. 2 Black. Rep. 1154.

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2. The next is the case of

AGENTS OR RECEIVERS.

1. An action for money had and received will not lie against a known agent, or receiver, for money paid *voluntarily* to such agent *for the use of the principal*, unless he had paid it over after notice not to do it: for it would be unjust to suffer such an action to proceed, and to leave him to be defended or deserted as the principal thought fit: and especially if the action is brought for the purpose of trying any right of the principal.

Sadler v. Evans. 4 Burr. 1985.

For where a man receives money for another as his agent, under a pretence of right (*ex. gr.* for tithe,) the Court will not suffer the principal's right to be tried in an action against the agent, if the defendant can shew the least colour of right in his principal: as in this case, by having been some time in possession.

Staplefield v Yewd. Trin. 27 G. 2. Per Lee, C. J. Bull. N. P. 133.

2. So where money has been paid to an agent or receiver *by mistake*, he shall not be liable to refund it if *he has paid it over to his principal*; for he should not suffer for another's mistake, but the prayer should resort to the principal himself; but if he has not paid it over to his principal, but *has it in his hands*, or *only given credit for it to his principal in his books or on an account between them*; in these cases he shall be personally liable, though not paid over: but if any new credit had been given to the principal by the agent on receiving the money, it would be proper evidence to leave to the jury, Whether the agent might not, or had not received any prejudice thereby? and so vary the case.

Buller v. Harrison. Cowp. 566.

3. "But as to how far the principal shall be bound by "the act of his agent, a distinction is to be observed be- "tween *a general and a particular agent.*"

Per cur. 3 Term Rep. 763.

A *general agent* shall bind his principal *by all his acts*, even though he exceeds his authority; as if a stable-keeper having an horse to sell, directs his servant not to warrant him, notwithstanding which he does, the master will nevertheless be liable on the warranty, because the servant was acting within the scope of his authority; and the public cannot be supposed to be cognizant of any private conversation between the master and the servant: but where a person is made a *particular agent*, and under a circumscribed authority; there he can only bind his principal *as far as he acts within his authority*, for to bind the principal to all such unauthorized engagements, would be to enable one man to bind another against his will.

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S. P. East-India Company v. Hensley. Espin. Cas. N. P. 111.

3. The next is the case of

MASTERS AND OWNERS OF SHIPS.

These are liable to this action. 1. For general charges against the ship. 2. For repairs. 3. For seamen's wages.

1. *As to general Charges against the Ship.*

1. "The master of a ship may bind his owners to any "contract which is for *the benefit of the ship*."

Yates v. Hall. 1 J. Rep. 73.

As where the ship was captured and ransomed, and the master prevailed on one of the seamen to become an hostage, and promised him the wages he then had (*4l.* a month) for the time he should remain with the enemy till the ransom was paid, to which the plaintiff agreed, and in consequence remained a prisoner from *May* 1780 to *August* 1783. The owners disputed the payment of the ransom bill, as being more than the value of the ship and cargo, which occasioned a suit in the admiralty: in consequence of which the ransom-bill was set aside, and the net proceeds of the ship and cargo paid to the captors. It was contended for the defendant, that the captain had exceeded his authority, and had no right to bind the owners beyond the value of the ship: but this being done for the supposed benefit of the ship, by a person having power to bind them, was adjudged to charge the owners: and the sailor recovered for the whole time he was in the custody of the enemy.

2. It is enacted by stat. 7 *G.* 2 15. "That no persons "who are or shall be owners of ships shall be liable for any "loss or damage, by reason of any embezzlement of, se-"creting or making away with (by the master or mariners) "any gold, silver, jewels, or merchandize or other goods "which shall be shipped, taken in, or put on board any "vessel *beyond the value of the ship and freight*."

Under this statute it was decided, That where a large quantity of dollars had been shipped on board the ship *Elbe*, from

p. 18.

from *London* to *Hamburgh*; and while the ship lay at anchor, in the *Thames* she was boarded by a number of fresh-water pirates, who robbed her of the dollars; that as the object of the statute was to protect the owners from all treachery of the master and mariners, and at the same time to subject them as far as *they* trusted the master and mariners; that it was necessary to prove the collusion or assistance of either the master or mariners; therefore in this case, it being proved, That one of the sailors had given information to the robbers when the dollars were brought aboard, and got share of them, that that satisfied the statute: and the plaintiff had judgment only to the amount of the ship and freight. [111]

3. "And for such general charges against the ship, the "*owners* are specifically liable."

For where the defendant was sole owner of a ship, *which he let to Fletcher for a voyage at a certain sum, and Fletcher was to have the benefit of carrying the goods.* The plaintiff had shipped a quantity of moidores, and the bills of lading were signed by the captain; the moidores being lost, an action was brought against the defendant as owner to charge him under the stat. 7. *G.* 2. to the amount of the ship and freight. For the defendant it was insisted, That *Fletcher* was owner to this purpose, and that he should be sued: but it appearing that the defendant had covenanted for the condition of the ship and behaviour of the master, it was ruled, that he was liable, for *Fletcher* had only the use, but *he* had the ownership, and that the freight he had from *Fletcher* was sufficient to charge him. Parish v. Crawford. 2 Stra. 1251.

2. *As to repairs done to the ship.*

1. If they are done *at home*, there is no lien on the ship itself, but the owners must be personally sued: but if the repairs are done *abroad*, by the maritime law the master may hypothecate the ship's bottom. Watkinson v. Barnardiston. 2 P. Wms. 367

2. The person who repairs a ship has his election either to sue the master who employs him, or the owners; but if he undertakes it on a special promise from either, the other is discharged. Garnham v. Bennett. 2 Stra. 816.

"But where no such agreement appears, both are subject: and no private agreement between the master and owners shall deprive a person who has a charge against the ship for repairs, from suing either party."

For where the owners of a ship *leased her for years to the master*, under covenants, giving him the sole disposal of her, for his own sole benefit, *he undertaking to keep her in repair during the term*; the owners were notwithstanding held to be liable for repairs done to the ship during the term, and necessaries Rich v Coe. Cowp. 636.

saries furnished to her, by order of the master, though they were unknown at the time to the plaintiff who furnished them: but if the plaintiff had had notice of the contract between the master and owners, it might be a ground to absolve the owners.

Cowp. 639.

" The owners therefore are generally liable; but the mas-
" ter only *on his contract*, and no further."

Farmer v. Davis. 1 T. Rep. 108.

He therefore is not liable to be sued for necessaries furnished to the ship *before the time he became master* of her: for there is no contract.

" So in order to subject a person as owner, he must be
" *absolute owner, and in possession.*"

Jackson v. Vernon. H. Bl. Rep. 114.

For where the plaintiff was a ropemaker, and supplied the ship *Three Sisters* with cordage and stores *on the 7th of Feb.* 1787 and 22d *July*, and 1st of *Aug.* 1788 *by the order of one Palmer, the owner*, without knowledge of the defendant. *On the 6th of Feb.* 1787, *Palmer* gave a bond to the defendant for 3000*l.* and *on the same day executed a deed, assigning the ship to the defendant absolutely*, with a power of selling her at any time for the payment of the money, but with a covenant to re-convey on payment of the money lent, but that not to interfere with the power of sale before given. *On the 7th of Aug. the defendant took possession:* on the 22d he sold her with an indemnity to the purchaser, against all demands up to that time; and this action was for the goods furnished at the times above mentioned, by order of *Palmer*, when it was resolved, That this was a conveyance in the nature of a mortgage; that *Palmer* was the owner *until the defendant took possession;* and that the defendant was therefore not liable until he took possession: and the defendant therefore had judgment.

3. " And so much is the interest of the master considered
" only as that of a servant, and the whole property in the
" owners."

Stevenson v. Mortimer. Cowp. 805.

That where a customhouse officer had exacted exorbitant fees from the master of a vessel; an action for money had and received was adjudged to lie against the officer at the suit of the *owners*.

4. " The owners may maintain *assumpsit* for the freight,
" but a *mortgagee of the ship* cannot until he has taken pos-
" session under the mortgage."

Chinnery v. Blackburn. East 24 G. 3. cit. H. Bl. Rep. 117.

For where *the owner had mortgaged the ship in Jan.* 1783, *to the plaintiff*, but the owner having victualled and manned the ship on a voyage to the *West Indies* and home, at his own risk and expense, had consigned her to the house of *Dunlap*, in *London*, with orders to sell her. *She discharged all her cargo on the 27th of September; and on the 29th the plaintiff took possession*

possession of her under his mortgage deed, and brought the present action for freight due by the defendant on her voyage from the *West Indies*; when it was resolved, That the defendant's contract being with the mortgagor; that the *mortgagee never having taken possession till after all the cargo was discharged*, nor executed any act of ownership whatever, he could not maintain this action.

3. *In the Case of Seamen's Wages.*

1. "Freight is the mother of wages; therefore in case a "loss happens to the ship, no wages are recoverable; that "is, the whole voyage must be performed, or the sailors "shall not be entitled to any wages, for the ship is only en- "titled to freight on delivery of the cargo."

Therefore where the plaintiff was engaged as a sailor on a voyage from *Barnstaple to Newfoundland*, and from thence to *Portugal or Spain*, *taking in a cargo of fish at Newfoundland*, and the ship was taken soon after she had sailed from *Newfoundland*; it was contended, that there were two distinct voyages, one to *Newfoundland*, the other from that to *Spain*; and that therefore the sailors were entitled to wages for the voyage to *Newfoundland*. But it was resolved, that the voyage was entire; *Newfoundland* being the place of landing, and *Spain* of delivery of the cargo, when only the ship is entitled to freight, and therefore in this case that no wages were due, the ship being taken before she had reached the discharging port.

Hernaman v. Bawden. 3 Burr. 1844.

Vid. L. Raym. 397. 632.

"And on this ground, where no freight is earning by "the ship, the mariners have no title to wages."

Therefore *while a ship is lading or unlading*, the sailors are not entitled to wages, unless there is a special agreement to that effect, to allow wages during that time; in which case it shall be good.

Campion v. Nicholas. 1 Stra. 405.

2. "And the case is the same of *Letters of Marque* or "*Privateers*: for the voyage or cruize must be performed, "or no wages are due to the mariners: neither shall it "give the officer or mariners any claim, that they were "*absent from the ship by the owner's direction*, when she was "lost; for they must still be considered as belonging to the "ship."

Therefore where the plaintiff had engaged on board a Letter of Marque on a cruize, at the rate of 5*l* *per* month, and a share of the prize money: they took a prize, and the plaintiff was put on board her as prize-master, and got safe to *England*; but the ship was afterwards taken on her cruize: it was contended for the plaintiff, that he had not deserted the ship, *but had been employed by the owners*, that he was therefore

Abernethy v. Landale. Dougl. 520.

therefore entitled to wages, as being employed in their service till the ship returned to *England*: but it was adjudged, that though he was entitled to a share of the prize-money, yet that he had no claim to wages, on account of the capture of the ship.

Hall v. Eden. E. 25 G 3. s. B. R. MSS.

But where the plaintiff was a sailor, and had engaged to serve on board a privateer by articles, in writing, under which he was to have no wages, but a share in the prize-money; and it was further agreed, "That all persons serving on board the privateer were to continue on board six months (the time of being in harbour not to be included) upon pain of forfeiture of all share of the prize-money." *Before the six months expired the plaintiff was pressed*, and put on board a King's ship; and *during the time he was on board, a prize was taken by the privateer*. It was adjudged, that the plaintiff having been *disabled by inevitalbe necessity, and employed in a meritorious service*, that he should not forfeit his claim to his share of the prize-money.

Chandler v. Greives. 2 H. Black. 606. *in not.*

3. Where a seaman is disabled in the course of his duty, as by an accident happening to him on board the ship, in consequence of which he is prevented from doing his duty for part of the voyage, he is nevertheless entitled to recover his wages for the whole of the voyage.

Grinar v. Meyer. 2 H. Black. 603.

4. Where *foreign seamen* bound themselves, by articles entered into at a foreign port, not to institute any suit in a foreign country, but to abide by the maritime laws of their own country; it was adjudged, that it barred them from suing here.

5. The next case of contracts I shall consider, are those made by

SERVANTS.

F. N. B. Ward v. Evans. Salk. 442.

1. A man shall be bound by the contracts made by his servant, *as far as he gives him authority* to buy and sell for him; but his act shall not bind the master, unless he acts within his authority.

2. "Where credit is given to a servant on *account of his* "*master or employer*, he is not *personally* liable."

Pochin v. Pawley. 1 Black. Rep. 670.

Therefore where the action was *assumpsit against the surveyor of a turnpike road*, by a farmer employed by order of the commissioners to repair the road: it was ruled, That the contract was made, not with the surveyor personally, but with the commissioners; and that the surveyor was but as their servant, and therefore was not personally liable.

Macbeath v. Haldimand. 1 T. Rep. 182.

So where the defendant, was governor of *Quebec*, and *in that capacity* contracted for stores upon government account, which

which were furnished by the plaintiff: it was adjudged, that the *credit being given to government only* through the defendant, as a servant to government; that he was not personally liable to an action for their amount.

*So where the defendant was commander of a King's ship, *and by deed* covenanted with the plaintiff, *on account of the King*, to pay the plaintiff a certain sum for freight: it was adjudged, That the deed having been entered into by him as a servant of government, and on their account, could not bind him personally. Unwin v. Wolseley. 1 T. Rep. 674. *[115]

3. If a master once sends his servant to get goods for him on trust, for which the master afterwards pays; if the servant afterwards fraudulently takes up goods from the same person, which he converts to his own use, the master is liable: for, by paying the first debt, he gave the servant a credit, and ought to be charged. Hazard v. Treadwell. 1 Stra. 506.

"But if the master never had any previous dealing with "a tradesman, but the tradesman's dealings have all been "with the servant, whom the master has regularly paid; "in that case the master shall not be charged.

As here, where the action was for oats and hay furnished to the defendant's horses; but the plaintiff had had no dealings with the master, but with the coachman to whom the master gave money for the purpose monthly: the plaintiff never applied to the defendant (the master) during the time, and the demand was of a year's standing: it was ruled, that the master was not liable to the demand. Kendal v. Andrews. Sitt. East. Term 28 Geo. 3 B. R. Fry v. Robinson. Sitt. Trin. 31 Geo. 3. Per L. Kenyon. S. P.

6. The next case I shall consider, is that of

PARTNERS.

1. "To make a person liable as a partner, there must be "an agreement between him and the ostensible person *to "share in all risks of profit or loss*, or he must have permitted "the other to use his credit, and to hold him out as jointly "liable with himself."

Therefore where in an action for money lent, the case was, That the defendants had employed one *Contencin*, who was *a tea broker, and as such was employed by several persons to purchase a lot of tea at the India sales*, of which each had separate shares, the lot being too large for one dealer. At the time of the sale the company give a warrant to deliver the tea, and payment is made to the company on these warrants, at three different payments; these warrants are often pledged, and money raised on them, generally much less than the value of the lot for which the warrant is given. In the present case, the plaintiffs were bankers, and had advanced money to *Contencin* on this note, and on the tea- Hoare v. Dawes. Dougl. 356

warrant, under which the defendants were joint purchasers. By the fall of tea, the value of the warrant became of less value than the money advanced, and *Contencin* having become a bankrupt, the plaintiff brought this action against the defendants, in order to charge them as dormant partners; but it was resolved, That in this case there was no partnership, no agreement among the parties to advance money for each other as to share in profit or loss; it was merely an undertaking to the broker by each purchaser for a particular quantity: so the defendant had judgment.

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"And it seems to be necessary, in order to charge a "person as partner on the ground of sharing in profit and "loss, to shew they were concerned not only in the joint "purchase, but in the *joint sale*; that is, that their interest "should continue joint till the time of the sale, when the "profit and loss would be ascertained."

Coope & al. v. Eyre & al. H. Bl. Rep. 37.

For where the plaintiffs were proprietors of a *Greenland* ship, and sold a quantity of oil to the defendants, but *Eyre* only was the ostensible buyer, and *the others were to share his purchase at the same rate he paid for it*. They had purchased quantities of oil from other persons, on which occasion the defendants had come forward and declared, that they had a joint concern with *Eyre*, but there were no declarations of that sort made to the plaintiffs: it was proved that the defendants were to have different shares of the purchase; but there was no proof of any future joint concern in the sale. It was resolved, That there was no evidence to make them partners, *their subsequent interest being distinct, and no interference with each other's future disposition of the goods, or the profit or loss arising from the sale of them.*

De Berkom v. Smith & al. Espin. Cas. N. P. 31.

But where a person represents himself as a partner, and by that means gets credit for goods for the other, though in fact he is not so; yet both shall be liable; for having pledged his own credit in aid of the other, he shall be liable.

2. "It is essential therefore to make a person subject as a "partner, that *he is interested in the profits*; that is, that the "*advantage* he derives from the trade is *casual*, as depend-"ing on these profits; for if it is *certain and defined*, he is "not a partner."

Grace v. Smith. 2 Bl. Rep. 998.

As here, where the defendant had been partner with one *Robinson*, but the partnership being dissolved, the defendant agreed to let a sum of 4000*l.* remain in *Robinson's* hands at *legal interest* for seven years, and *to receive beside an annuity of* 300*l. per ann.* for the same time; all of which was secured by *Robinson's* bond. It was held that this should not make the defendant a partner, and subject to *Robinson's* contracts; for he had no concern with the business, and the annuity and interest was *certain and independent of the profits.*

But

But where the defendant in this action had been partner with one *Brooke*, and they agreed to separate, and *Brooke* agreed to give him his bond for 2485*l.* with *interest, which sum had been brought by the defendant into trade, and an annuity of 200*l.* for seven years, if *Brooke* so long lived, as in lieu of the profits of the trade; and the defendant had at all times liberty to inspect *Brooke's* books. The defendant was adjudged to be a partner and liable; for the charge had reference to the profits, it was *casual* as depending on *Brooke's* life, and his right to inspect the books was that of a partner.

Bloxham v. Pell. Sittings Hil. Term 1775. quot. Black. Rep. 999.

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Waugh v. Carver. 2 H. Black. 236. S. P.

3. "It should seem, that if money is lent or intrusted to "one partner, and he brings it into the partnership trade, "with the knowledge of the other partners, that all are "liable."

For where *Robert* and *Thomas Jameson* being partners, and *Robert* being chosen a co-assignee to a bankrupt estate of *Lewis* and *Potter*, and in that capacity became possessed of 2000*l.* part of that estate; this sum he brought into the partnership trade with the privity and consent of *Thomas Jameson*, and they divided the profits on the joint fund; but it did not appear, that the other assignees of *Lewis* and *Potter* knew that the money was so used or applied. In *December* 1792, the partnership between *Robert* and *Thomas Jameson* was dissolved, and effects were left in *Robert's* hands, who continued the business, sufficient to pay that sum, as well as all other demands against the partnership estate; and *Robert* took on himself the partnership debts. In *March*, 1793, *Robert* committed an act of bankruptcy, and then a joint commission was taken out against both partners. The Court were of opinion, that, notwithstanding these transactions, *Thomas Jameson* was not discharged, but liable for the money so brought into the trade by his partner.

Smith v. Jameson. 5 T. Rep. 601.

4. Where there is a partnership demand, *all the partners should join in the action*, for the contract and undertaking is joint; and if in such case one partner only brings the action, the defendant may take advantage of it at the trial, and nonsuit the plaintiff, for the contract is not the same; but in the case of a tort this must be pleaded in abatement.

Leglise v. Champany. 2 Stra. 820.

Therefore, where the plaintiffs were partners with two other persons of the name of *Grant*, and they were joint owners of a privateer which cruized in company with the defendants, under an agreement to share the prizes equally. They took a prize in the *Mediterranean*, which was condemned at *Minorca*, and divided the money arising from the sale: the sentence there was afterwards reversed here, and restitution ordered; upon which the *plaintiffs alone* paid the whole money (their partners having become bankrupts) and now sued the defendants for the moiety, and they were nonsuited; for if the money was partnership property, the action should

Graham v. Robinson. 2 T. Rep. 282.

should have been *in the name of all the partners*; if it was their own, each should have had his own action.

Garret v. Taylor. Sitt. G. Hall. Trin 4 G. 3. MSS.

But in this case, three persons had employed the defendant to sell some timber for them, in which they were jointly concerned; two of them he had paid their exact proportion, and they had given him a receipt in full of all demands; *the third now brought his action for the remainder being his share*; and it was objected, that as this was a joint employment by three, one alone could not bring his action: but it was ruled by Lord *Mansfield*, That *where there had been a severance*, as above stated, that one alone might sue.

Kirkman v. Newstead Sitt. Westm. M. 1776. MSS.

So where the action was for the use and occupation of a house, it appeared that the house was the property of six several tenants in common; to all of whom, except the plaintiff, the defendant had paid his rent; and this action was for his share of the whole rent. It was objected, that one tenant in common alone could not bring this action, but that all ought to join: but Lord *Mansfield* overruled the objection, and the plaintiff recovered.

Martyn v. Crump. Salk. 444. *[118]

*So where one partner dies, the other should bring his action alone: for the executor and the survivor cannot join, for the remedy survives, but not the sum recovered; and therefore on recovery he is liable to the executor for part.

Smith v. Barrow. 2 T. Rep. 476.

And for a sum of money due to the partnership, the surviving partner may bring an action in his own right, and not as survivor, *against a person who has received it after the death of the other partner*; for against this person the deceased partner never had any right of action, and so the plaintiff need not declare as surviving partner: and though the person who has so received the money is an after-taken partner, and has carried the money to the partnership account, yet will this action lie; for the defendant has wrongfully applied money belonging to the plaintiff, and must therefore be answerable for it.

Rice v. Shute. 5 Burr. 2611. 2 Bl. Rep. 695. Abbot v Smith. 2 Bl. Rep. 947. S. C.

5. But if an action of *assumpsit* is brought *against one partner without joining the other*, the defendant must take advantage of it by pleading that matter in abatement; for if he was allowed to give it in evidence, and so to nonsuit the plaintiff, it would be endless litigation, unless the plaintiff knew all the partners: but when the defendant pleads in abatement, he sets out all his partners, and the plaintiff knows against whom to proceed.

Per Lord Mansfield. 5 Burr. 2613. 2 Bl. Rep. 696.

"For all contracts with partners are joint and several, "and every partner is liable to pay the whole; and in what "proportions the others are to contribute is a matter merely "among themselves; the plaintiff may however bring his "action against one, but *he* may compel by a plea in abate- "ment the plaintiff to join them all: and if he brings his "action

" action against all, yet he may take out execution against " one only."

But if one partner is out of the kingdom, and not amenable to the process of the court, the defendant may proceed singly against the other: but the plaintiff must first proceed to outlawry against the partner who is absent. Symonds v. Parminter. 1 Wils. 78. Darwent v. Walton. 2 Atk. 510. Hyatt v. Hare. Comb. 283.

So if two partners buy goods, and one of them dies, the survivor may be charged in *indebitatus assumpsit* generally, without taking notice of the partnership, or that the other is dead, and the surviving partner. *Vid.* Slipper *v.* Stidstone, *post*.

7. The next class of contracts I shall consider with reference to the person, are those arising in the case of

BANKRUPTS.

These are, 1st, By the assignees. 2dly, Against them. 3dly, Against the bankrupt himself. 4thly, By the bankrupt himself.

1. *Of Actions by the Assignees.* [119]

1. " The assignees standing in the place of the bankrupt, " are invested with all the rights of property of the bank- " rupt; and whatever property of the bankrupt is in the " hands of others, after an act of bankruptcy committed, " or comes to him before his certificate is allowed, belongs " to the assignees, and may be recovered by them in this " action." 3 Wils. 307.

Therefore where a legacy had been given to a bankrupt, and the testator died when the certificate had been signed by four-fifths in number and value of his creditors, and by the commissioners, but before it had been confirmed and allowed by the Chancellor. This was adjudged to belong to the assignees, the certificate not being complete when the bankrupt became entitled to the legacy. Tudway v. Bourne. 2 Burr. 216.

Assumpsit therefore also lies to recover back money which has been *levied by the sheriff under a fieri facias against the goods of the bankrupt, issued after he had committed an act of bankruptcy* against the plaintiff at whose suit the *fieri facias* was sued out: for from the moment a person becomes a bankrupt, the property of all his goods, debts, and credits, vests in the assignees. Here the act of bankruptcy having preceded the sale by the sheriff, and he having paid over the money to the plaintiff in the action, he was held to be the receiver of so much to the use of the assignees, as was the produce of the bankrupt's goods sold by the sheriff: and it was recovered in this action. The idea formerly was, that the assignees were obliged to proceed as for the tort in taking the goods. Kitchen v. Campbell. 3 Wils. 304.

" And

"And all dispositions of his property made after an act "of bankruptcy are on the same principle void, except as "*post*. 120. *div.* 3."

Barnesy. Freeland. 6 T. Rep. 80.

As where a party had sold goods to a bankrupt before his bankruptcy, and had delivered them and taken a bill in payment, which was payable at a future day. Before the bill became due, the bankrupt finding he could not stand, restored the goods in specie to the seller. It was adjudged to be void, and the goods recoverable by the assignees; for by the sale and delivery of the goods there was a complete transfer of the property from the seller to the bankrupt, which could not be rescinded by him, as such would be a fraudulent preference as to the other creditors.

Brandon v. Pa.e 2 H. Black 308.

So it was in this case decided, That the assignees of a bankrupt might maintain an action on the stat. 9 *Ann.* 14. to recover from the winner money lost by the bankrupt at play before his bankruptcy.

2. "But it is enacted by statute 1. *Jac.* 1. 15., "That no "debtor of the bankrupt shall be endangered for the pay- "ment of his or her debt, truly and *bona fide* made *to* such "bankrupt before such time as he shall understand or know "that he was become a bankrupt.

"Before this statute, if a debtor to the bankrupt had "fairly paid a debt due to the bankrupt after he had com- "mitted a secret act of bankruptcy, though it was not known "to the debtor, he was liable to the assignees; but by this "statute he is protected; but if he pays what he owes to the "bankrupt *after he has knowledge of the act of bankruptcy*, "he is liable notwithstanding to the assignees."

Vernon v. Hankey. 2 T. Rep. 113.

As where the defendant who was a bankrupt, *paid drafts drawn on him by the bankrupt after he knew of the act of bankruptcy*, he was compelled to pay *the amount again to the assignees.*

Foster v. Allanson. 2 T. Rep. 479. *[120]

*But payments made *voluntarily*, as in the last case, are only liable to be so overreached by the act of bankruptcy; for if *an action is brought* against a person having money of a trader in his hands by a creditor, though he knows that the trader has committed a secret act of bankruptcy, yet it will be no defence to the action to rely on such secret act of bankruptcy; for perhaps a commission might never be sued out, and then the debtor never would pay at all.

"But where a debtor to the bankrupt has notice *that a* "*commission will issue*, grounded on an act of bankruptcy "then committed, he can in no case pay the money to the "bankrupt; and in such case it is not necessary *that the act* "*of bankruptcy should be complete* at the time of the notice, "for by the relation back the effect will be the same, if the "act of bankruptcy was inchoate at the time of the notice."

Therefore

Therefore in the present case, the bankrupt had been arrested on the 19th of *January* at the suit of the plaintiff who was now assignee, and became a bankrupt by lying two months in gaol, which time expired on the 26th of *March*. On the 19th of *February the plaintiff's attorney wrote to the defendant* (who had been employed by the bankrupt as a broker to sell his effects) *not to sell them, as Langman had committed an act of bankruptcy; and that a commission would shortly issue against him*, which would relate to the day when he was first arrested; notwithstanding which the defendant sold the goods *before the two months expired*, and paid the money over to the bankrupt: it was adjudged, that this was not a payment made by the defendant within the stat. of *Jac.* as there was notice to him, while the act of bankruptcy was inchoate; and which afterwards being complete, vested the property in the assignees from the first arrest: and that therefore the defendant was liable as for money had and received to their use.

King, Ass. of Langman v. Leith. 2 T. Rep. 143.

3. And by stat. 19 *G.* 2. *c.* 2. "If money on bills of exchange or in the course of business, is *bona fide* paid *by* "the bankrupt to a fair creditor, though after a secret act "of bankruptcy committed, it shall not be liable to be refunded, provided such creditor *had no notice* prior to the "receiving of his debt that the debtor was insolvent."

Before this statute, if a creditor of the bankrupt had received payment of his debt after a secret act of bankruptcy, he was liable to refund it, though at the time he did not know of any act of bankruptcy committed: but this statute protects all payment fairly made without knowledge of it.

"But it confines strictly to the terms of it, all disposition [121]
"of his property by the bankrupt, so that after an act of "bankruptcy committed, he can only dispose of his property "in the regular course of trade, as *by paying for goods when* "*delivered, or bills of exchange or notes when regularly due.*"

For where the act of bankruptcy was committed on the 2d of *May*, 1785, but unknown to the defendant or any of the creditors: some months prior to the bankruptcy, the defendant had sold an estate to one *Utterson*, who paid him for it by a bill of exchange drawn on the bankrupt, and payable the 7th of *February* of the same year. The defendant applied for payment when it became due to the bankrupt, but was told that it was not then convenient to pay it, but that if he would hold the bill, that he should be allowed interest. He did so till the 22d of *May*, 1785, when he demanded payment, and received the money without knowing of the act of bankruptcy: the assignees brought this action, recovered it back, the Court being clearly of opinion, that *it was not a payment made in the course of business, and so was not protected by the statute.*

Vernon, Ass. of Tyler v Hall. 2 T. Rep. 646.

So

Bradley, Ass. of Bradley, v. Clarke. 5 T. Rep. 196.

So where the bankrupt was indebted to the defendant in the sum of 44*l. for the carriage of goods* in the way of the bankrupt's trade, and on the 24*th of November* the defendant caused him to be arrested for it, and *he thereupon paid it*: the defendant did not know that the bankrupt had then committed an act of bankruptcy, which however he had committed on the 17th of November preceding, and the commission issued the 23d of December. It was adjudged, That as this money *was paid after an act of bankruptcy committed, and did not come within either of the exceptions of the statute*, it was not protected and therefore was recoverable back again by the assignees.

Finnerton v. Marshall, 2 H. Black. 334.

So where the defendant, who had a verdict against the bankrupt before he had committed an act of bankruptcy; after an act committed, consented, instead of entering up his judgment, to take the bankrupt's bill on a third person, but without knowledge of the act of bankruptcy being then committed, and which bill was paid when due; it was held not to be protected by stat. 19 *G.* 2. but recoverable back by the assignees.

2. As against the Assignees of a Bankrupt.

Brown executor v. Bullen. Dougl. 392.

Where the plaintiff's testator had proved a debt against the bankrupt estate, to which the defendant was assignee; it was held that the executor might maintain *assumpsit against the assignees under an order for a dividend*, and that the proceedings before the commissioners should be conclusive evidence of the debt. And it was further adjudged in this case, that, for that reason, the assignees shall not be allowed to plead a set-off; for as the commissioners have a power of setting off mutual debts, *the debt proved and allowed shall be deemed the balance.*

3. Of Actions against the Bankrupt himself.

"Wherever the bankrupt is indebted in any sum which "is not proveable under his commission, though the case "of action preceded the act of bankruptcy, such is recover- "able against the bankrupt himself."

Howis v. Wiggins. 4 T. Rep. 714. & Cas. ibid. post. 158.

As where the bankrupt before his bankruptcy drew a promissory note payable to the plaintiff, which the plaintiff indorsed, and the defendant had before his bankruptcy delivered it to one *Green*, who sued the plaintiff, *and recovered the amount of the note after the bankruptcy of the defendant*; it was held, that he should recover the amount, and that the bankruptcy was no bar: for that the plaintiff had no legal security for a debt which he could have proved under the commission at the time of the bankruptcy, the bill being then the property of another; but the cause of action arose by paying the bill, which was subsequent to the bankruptcy.

So

"So if he makes himself liable by a new promise." Truenian v. Fenton. Cowp. 544.

But it was decided in this case, that a bankrupt who had paid ten shillings in the pound, but at the time had not obtained his certificate, could not maintain *assumpsit* against the assignees for the allowance given by the statute. Groome v. Potts. 6 T. Rep. 548.

4. Of Actions by the Bankrupt himself.

The bankrupt while uncertificated may maintain an action for work, and labour, and materials found: for the assignees only, who have in them all the rights of property, shall be allowed to set it up, not a stranger. Silk v. Osborne. Espin. Cas. N. P. 140.

So he may maintain an action for money lent. Evans v. Browne. Espin. Cas. N. P. 170.

8. The next is the case of

EXECUTORS.

Assumpsit lies against an executor on a promise by the testator. Norwood v. Read. Plowd. 181.

So he may also maintain this action on a promise made to the testator.

9. The next class of contracts which I shall consider as in relation to the person, are those respecting

HUSBAND AND WIFE.

1. How far the husband is chargeable with the wife's contracts. 2. How far he is benefited by her contracts.

These contracts are, 1st, Contracts entered into by the wife *before marriage*. 2dly, Such as she enters into *during cohabitation*. 3dly, Such as she may have entered into *after elopement from her husband*. 4th, Such as she enters into after *having been turned away by her husband*. 5th, Such as she enters into after a separation, *where she has a separate maintenance*. Under each of which heads, I shall inquire how far the husband is liable.

1st, Of the Wife's Contracts before Marriage.

The husband is liable to all debts contracted by the wife before marriage; for as by marriage he becomes entitled to all her property, he shall take it subject to her debts. 2 Bl. Com. 429.

But if a woman be indebted *dum sola*, and marries and brings a portion to her husband, and dies, the creditor shall lose his debt, unless he has sued for it and recovered it in the wife's lifetime, unless she has left choses in action sufficient to satisfy the debt; for by the law the husband is only liable to his wife's debts during coverture, unless there has been a judgment against him in wife's lifetime. Heard v. Stamford. 3 P. Wms. 409.

1 Sid. 120.

1. "*During the cohabitation of the husband and wife*, he is "answerable for all debts contracted by her *for necessaries*, "from the implied credit arising from cohabitation, but for "nothing further."

Manby v. Scot. 2 Lev. 4.

And these necessaries are to be judged of *with reference to the estate of the husband, and of his degree or rank in life.* For an high degree may have a low estate. And of this matter the jury are to judge, and to find accordingly, so they are also to find the assent as well as cohabitation of the husband.

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"But the husband is not even liable for necessaries, if "*the debt has been contracted under illegal circumstances.*"

Fowler v. Dinely. 2 Stra. 1122.

As where the defendant's wife was in custody in execution, on a charge of subornation of perjury, and of course should have been *in prison*, but was suffered to remain at the house of the plaintiff, who kept *a spunging house* within the Rules, who furnished her with necessaries, for which this action was brought: the defendant had judgment; for her being in plaintiff's house was illegal, she not being such a prisoner as was entitled to the benefit of the Rules, and in such case the law will not raise an implied promise to charge the husband.

2 Ell. N. P. 135.

2. "And as the husband is charged by the wife's con- "tract on his implied consent to provide her with nec- "essaries during cohabitation, *therefore where he shews his* "*dissent* he shall not be liable, as by *a general notice to all* "*tradesmen not to trust his wife*, which seems to be suffi- "cient."

Etherington v. Parrott. Salk. 118.

As where in an action against the husband for goods sold and delivered to the wife during cohabitation, it was proved that she was very extravagant, and used to take up clothes to a large amount, and pawn them at an under value, and that the *husband had given notice to the tradesman*, who was the plaintiff in this action, *not to trust her further*, the husband was held not to be liable for the goods so taken up after that notice of his express dissent.

& C.

And in this case the Ch. Just. *Holt* further held, "That "if a woman takes up goods (as silks) for the purpose of "making them into clothes, and pawns them before they "are so made up, the husband is not liable, for they never "came to his use: otherwise, if made up and worn, and "then pawned."

"But the wife can in no case *borrow money*, even to pay "for necessaries, as she might squander it."

2 P. Wms. 183. Stephenson v. Hardy. 3 Wils. 388.

Therefore this action will not lie for money *lent* to the wife, for she can make no contract; but if *it be at the special instance*

sistance and request of the husband, it is good; for it is then a loan to him.

"So in the case of goods, a delivery to the wife at his "request is a delivery to him."

For where the plaintiff declared, for meat, &c. found by the plaintiff at the defendant's request, and on evidence it appeared to be found for the defendant's wife at his request during his absence. On a case reserved it was holden, "That a delivery to the wife at the husband's request, is "a delivery to the husband," and that so he is chargeable. But this is during cohabitation. *Vide post. Ramsden v. Ambrose.*

Ross v. Woot. Pasch. 31. G. 2. C. B. Bull N. P. 136. [124]

3. *And as to what shall be deemed necessaries.* Where an husband gave his wife the foul disease, and *the debt was for her cure*, it was held necessary, and that he was liable.

Harris v. Lee. 1 P. Wms. 482.

So where the defendant went abroad, and left his wife in *England*, where she died, and the plaintiff who was her father, paid *the expenses of her funeral*, which were proportionate to her husband's fortune; they were adjudged to be necessaries, and the amount recovered against the defendant.

Jenkins v. Tucker. H. Bl. Rep. 90.

2d, Of the Wife's Contracts, where the Husband has turned her away.

1. "Though the wife be ever so improper in her conduct, "yet while she continues with her husband, he is bound "to find her necessaries, and pay for them; for he took "her for better, for worse: *so if he runs away or turns her "away*, he is in like manner liable, for he still sends with "her credit for her reasonable expenses."

Robinson v. Greinhold. Salk. 119.

As where the defendant and his wife lodged at the plaintiff's house, who was a milliner, during which time she furnished the wife with money and other things without the husband's knowledge; he paid for them, but forbade the plaintiff to trust her further. The husband and wife cohabited together for a year after, when he turned her out of doors, and declared he would not maintain her. In this distress she applied to the plaintiff, who furnished her with necessaries according to her degree, for which this action was brought: when it was resolved, that the causeless turning her away gave her a general credit, and that he being the wrong-doer could not give such a prohibition to furnish her.

Bolton v. Prentice. 2 Stra. 1214.

2. And *Note*, That if a man cohabits with a woman, allows her to assume his name, and passes her to the world for his wife, though in fact he is not married to her: yet is he liable to her contracts for necessaries. And therefore *ne unques accouple in loyal matrimonie* is a bad plea in an action on the case for the debt of a wife; and on demurrer, plaintiff

Per Lord Mansfield. Hudson v. Brest. Sittings after Hil. 26 Geo. 3. Norwood v. Stevenson. Trin 11 & 12. G. 2. B. R. Bull. N. P. 136.

plaintiff would have judgment: it is good only in dower, or an appeal.

4th, Of the Wife's Contracts after Elopement.

Robinson v. Greinhold. Salk. 119.

1. "*If the wife elopes, and goes away from her husband*; "when such separation becomes notorious, whoever gives "her credit does it at his peril; for the husband is not liable "unless he takes her again; for then the cases are governed "by analogy to those at common law where a woman had "eloped, she thereby forfeited her claim to dower: but "if the husband received her again, her right to dower was "revived."

Morris v. Martyn. 1 Stra. 647. 1 Stra. 706. S. P.

And where a wife has so eloped and got credit, though the tradesman who furnishes her with necessaries *has no notice of her elopement*, yet he shall not recover against the husband, against whom the act of elopement destroys all claims.

Child v. Hardyman. 2 Stra. 875.

So it seems to make no difference whether the elopement is adulterous or not; for in no case shall the husband be charged. But if the elopement be not adulterous, Lord *Raymond* seemed in this case to think, that the husband's refusal to take her again might, *from that time*, excuse the elopement.

Govier v. Hancock. 6 T. Rep. 603.

And where the *husband* had *himself committed adultery, and turned his wife out of doors*, at which time there was no imputation on her conduct, but she afterwards committed adultery; it was adjudged, that for necessaries furnished after having committed adultery, the husband was not liable.

2. "So neither shall the *wife herself be charged* for goods "furnished to her during the elopement and absence from "her husband."

Hatchet v. Baddeley. 2 Bl. Rep. 1079. Gilchrist v. Brown. 4 T. Rep. 766. S. P.

For where she was sued as a *feme sole* for a carriage furnished to her by the plaintiff, during her elopement; on the ground of her having eloped from her husband and living separate, it was adjudged against the plaintiff; for she was a *feme covert* still as to every right but dower, and not to that, if adultery was proved: and so could not be sued alone.

Ramsden v. Ambrose. 1 Stra. 127. Harris v. Collins. Trin. 12 G. 1. Bull. N. P. 136.

And *Note*, That where the husband and wife live separate, if an action is brought for necessaries or the maintenance of the wife, it should not be laid as for necessaries furnished *to him*; but the special matter should be stated; for otherwise a recovery in that action would not be a bar to a special one brought for the maintenance of the wife.

5th, Of

4th, Of the Wife's Contracts, having a separate Maintenance.

1. "Where the husband and wife *part by consent*, and *she* "*has a separate maintenance* from the husband, she shall in "all cases be subject to her own debts."

This was first decided and settled in this case, where, to an action against the defendant for goods sold, she pleaded coverture and the plaintiff's replication, that she lived separate and apart from her husband, from whom she had a separate maintenance, and so was liable to her own debts, was on demurrer holden to be good, and the plaintiff had judgment. Ringstead v. Lady Lanesborough. Mich. 23 G. 3. & Hill. 23 G. 3. Corbet v. Poelnitz 1 T. Rep. 5. S. P.

In the case of Lady *Lanesborough*, the plea stated coverture; but *that her husband lived in Ireland*, which being out of the process of the court, some stress was laid on it in the decision; but in this case it was decided as a general principle, that the husband was not liable in any case where the wife lived apart, and had a separate maintenance; and this principle was recognized in *Corbett v. Poelnitz*, which followed it. Barwell v. Brooks. Hill. 24 G. 3. MSS.

But to make the wife liable to her own debts, the separate maintenance should be a permanent provision for her, and so should be reserved by deed. Stedman v. Gooch. Espin. N. P. Cas. 7.

On which principle, where the plaintiff to a plea of coverture replied, "That there was a suit then depending between the defendant and her husband in the Ecclesiastical Court, and that in the said suit, the judge allowed *her alimony* during the suit, to the amount of 200*l. per ann.* and that the credit was given to her on her own account: this on demurrer was held to be bad, as not being a fund of sufficient permanency whereon to fix her with her own debts. Ellah v. Leigh. 5 T. Rep. 679.

So the *executor of the wife* who lived separate from her husband, and who carried on business on her own account, in which capacity the debt accrued, was held not to be liable at law to her debt, though he became possessed of goods as her property; though it might be otherwise in a Court of Equity. Clayton v. Adams. 6 T. Rep. 604.

"2. "And it seems therefore that a personal knowledge of "the separation of the husband and wife, and of her having a separate maintenance, is not necessary in order to "discharge the husband; for if it be publicly known in the "place where the parties live, it is sufficient; and that "the notification need not be in the place where the wife "afterwards runs in debt."

And accordingly in this case, where the husband lived in *Chichester*, where he had parted with his wife, and the action was for drugs furnished to his wife in *London*: it being Todd v. Stokes. Salk. 116. Case K. B. 244. S. C.

being proved that the separation had taken place five years before, during which time she had had a separate maintenance, *Holt*, Ch. Just. held, that the husband was not liable. For it was not to be presumed but that tradesmen that delt with her trusted her on her own account, and not on the credit of her husband; and a personal notice was not necessary, it was sufficient if it was publicly and commonly known.

3. "But when the husband and wife live apart, the wife "must have a separate maintenance *from the husband* in "order to discharge him."

Thompson v. Herves. 4 Burr. 2078. *[127]

*Therefore where the wife had *a pension* during pleasure; it was held, that this should not be deemed such a separate maintenance or alimony, as should discharge the husband from a demand against him for necessaries furnished to her, where he had turned her out of doors.

4. "On the same foundation as that of separate maintenance, wherein the wife is considered as sole, *wherever* "*the husband is in circumstances not to be sued, as not amenable* "*to the process of the court*, the wife shall be sued as sole."

Perly v. Duchess of Massareene. Salk. 116. 1 Lord Raym. 147. S. C. Sparrow v. Carruthers.

As where the husband of a feme covert is *an alien enemy*, or *has abjured the realm*; in such case the wife is chargeable as a feme sole. *Co. Litt.* 132. *b.* 133. *a.*

So where *the husband of a woman had been transported*, the wife was held to be suable as sole.

Per J. Yates. 2 Bl. Rep. 1197.

And lastly, By the custom of *London* a feme covert, carrying on business in *London* on her own account, is liable to her own debts, independent of her husband.

2. So far is the husband subject to the debts and contracts of the wife. We shall now inquire *how far he is benefited by her contracts*.

1. "Whatever the wife earns during coverture belongs to "the husband; and he shall bring an action for it in his "own name."

Buckley v. Collier. Salk. 114.

For where the *husband and wife* brought an action against the defendant for work done for him *by the wife*. And on demurrer the defendant had judgment, for the husband should have brought the action alone; for the action being a general *indebitatus assumpsit*, no promise shall be supposed to have been made to the wife: and as the wife's debts would fall against the husband's estate, so the profits of her labour shall go to him or his executor.

2 Bl. Rep. 1239.

"But where there is an express promise to the wife, the "husband may assent to make it a joint contract; and then "she may join."

As

As where an act is done by the wife (as the delivery of money) and the promise is made to her, though done without the authority from the husband; yet he may after assent to it, and they may join in the action. Pratt & Ux. v. Taylor Cro. Eliz. 61.

So where the consideration was, that if the wife would cure the defendant of a wound, that he would pay her 10*l.* It was held, that the cause of action arising from the labour and skill of the wife, and the promise being made to her, that she might join her husband in the action. Brashford v. Buckingham. Cro. Jac. 205. [128]

Therefore in all actions of *assumpsit* wherein the husband and wife join, *the interest of the wife must be stated*: for otherwise, as the wife can make no contract, and the husband has the benefit of all made by her, the *assumpsit* shall be deemed to be only to the husband, unless her interest specially appears. As in the cases just stated; so *where she has a separate property*; so *if the cause of action existed before her marriage*; in which cases she should join. Bidgood v. Way & Ux. 2 Bl. Rep. 1236.

But where the wife married a second husband, the first being living, but he not being privy to it; it was held by C. J. *Parker*, that she should be deemed to be as a servant to the second husband, and that so he should have what she earned during cohabitation with him. Stratville— 1 Stra. 80.

2. Where an ordinary working man married a woman of like condition, and after cohabitation for some time left her, and during his absence the wife worked, and the action was brought for her diet: it was held, that the money she earned should go to keep her. Warr v. Huntley. Salk. 118.

10. Of actions by

CHURCHWARDENS.

Churchwardens are a corporation for the purpose of taking care of the goods and property of the church, and may maintain actions for money withholden from the parish: and the actions are maintainable by the churchwardens *de facto*, who are admitted and sworn into the office, though there may be a doubt as to whether legally appointed or not: and an action may be maintained by the churchwardens *de facto*, against any former churchwardens for money of the parish received by them and not accounted for, and that though the plaintiffs are not their immediate successors. Turner & al. v. Baynes. 2 H. Black. 559.

11. Lastly, As to actions against

OFFICERS OF THE REVENUE.

It has been decided,

"That where money has been extorted by an officer of "the revenue, who had seized goods illegally, to induce "him

"him to restore them to the owner, such money may be "recovered back again in this action."

Irving v. Wilson. 4 T. Rep. 485.

For where the plaintiff was owner of a quantity of hams, which were coming from *Scotland* in three carts, and he had a permit for their removal. One of the carts being a mile and a half before the rest, was met by the defendants who were excise officers, who demanded the permit: they were informed that it was with the carts which were behind: notwithstanding which they seized the three carts. Afterwards the matter being explained they refused to deliver up the carts unless 2*l*. 11*s*. was paid for their release: this sum was paid and this action brought to recover it back. It was adjudged that this money was clearly recoverable, as being obtained by extortion from the plaintiff. And it was further resolved, That though under statute 23 *Geo.* 3. *c*, 70 *s*. 30. the officer is entitled to a month's notice before action brought against him, yet that in this case he was not, for this action was for an act not done *colore officii*, and therefore notice was not necessary. And *Grose*, Just. was of opinion, that the statute applies only to cases of trespass or tort, not to actions of *assumpsit*.

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Greenway v. Hurd. 4 T. Rep. 553.

But in this case, where an excise officer had received from the plaintiff a sum of money for duties on cotton, after the statute imposing them had been repealed: but *had paid it over to his superiour officer before the action brought*; it was resolved that in this case *assumpsit* for money had and received would not lie: for the *payment by the plaintiff was voluntary*, and the officer on receiving it was compellable to pay it over, and therefore should not be subjected to an action for doing what was his duty. And the court were further of opinion in this case, *that the officer was entitled to notice under statute* 23 *Geo.* 3.

5. "Having now considered the several foundations of this "action, and the persons by and against whom it may be "maintained, it now remains to consider,

III. THE PLEADINGS AND EVIDENCE.

1. OF THE PLEADINGS ON THE PART OF THE PLAINTIFF.

Before I treat directly of the pleadings, I shall premise as to the time when this action may be commenced.

"That where the debt is to arise from several acts to "be performed at different times, each performance is a "distinct duty, for which an action may immediately be "brought."

For

For where in this case the plaintiff sold sixty comb of barley to the defendant, which was to be delivered before *Christmas*, and the plaintiff delivered fifty comb before that time, and then brought his action for the amount of that parcel: it was resolved, that though the agreement was entire, yet that every delivery made a several contract, which would maintain this action. Barker v. Sutton. Norfolk Ass. 1662. Per Hale. Trials p. Pais. 186.

So where the contract was to pay 20*l.* by 10*l.* at *Mich.* 1631, and 10*l.* at *Mich.* 1632; it was adjudged, that the plaintiff might maintain his action immediately on the first payment becoming due. Milles v. Milles. Cro. Car. 241.

I now proceed to the pleadings.

*1. "Where there is a *special contract or agreement*, the "plaintiff ought to declare on it, for the defendant ought "to have notice that he is sued on it; and the plaintiff "should not be allowed to go into evidence of any special "agreement on a general account in *indebitatus assumpsit*, by "which the defendant might be taken by surprise, unless "he had notice from the plaintiff that he meant to rely on "the general as well as special ground." Per Lord Mansfield. Dougl. 24. 1 T. Rep. 134. *[130]

Therefore where in *indebitatus assumpsit* for goods sold and delivered, the defendant pleaded *non assumpsit*, and gave in evidence that he had become insolvent, and that the plaintiff and his other creditors had given him a letter of licence to recover the debts due to him, which he had done, that they had received four shillings in the pound, and that the plaintiff and the other creditors had signed a release; the plaintiff pretended, and would have given in evidence, *that the defendant had given a note promising to pay the entire debt if he would sign the release, and produce the note.* But *Pemberton*, Ch. Just. refused to admit it, and held that the release was good evidence for the defendant on *non assumpsit*, and that the plaintiff ought to have declared specially on the special promise, if he meant to have availed himself of it. Knight v. Cox. Sussex, 1682. Bull. N. P. 153.

2. "Where the *assumpsit* is founded on an agreement in "which *something is previously to be performed by the plaintiff*, "on condition of which the defendant undertakes to pay: "it is necessary for the plaintiff in his declaration to aver "either a *general performance of his part*, or *that he is ready to* "*do it*, and also a notice by request to the defendant."

For where the plaintiff declared that, on the compromise of a suit, the defendant undertook to pay him a certain sum of money in consideration of his executing to the defendant a general release. In *assumpsit* for the money, and *judgment by default*, the judgment was arrested, for the reason that the plaintiff had not averred *that he had executed the release, or was ready to do it*, which was necessary to support the action, the release being a condition precedent: but it was further Collins v. Gibbs. 2 Burr. 899.

held, that the want of the averment, would be *helped by a verdict*: therefore the defendant should take the advantage of the omission, either by demurrer, or, if the *judgment was by default, by arrest of judgment.*

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"*And therefore notice and request to the defendant should be* "*averred.* For there can be no default in the defendant till "he has had notice of the performance of plaintiff's part."

Holmes v. Twist. Hob. 31.

Therefore where in *assumpsit* the plaintiff declared on an agreement by the defendant to pay him for one load of wood at the same rate he sold the rest of it, and shewed that he had sold to the defendant one load, and averred that he had sold the rest for 23*d*. the load, and that the defendant had not paid, the plaintiff had a verdict in *K. B.* On a writ of error, the judgment was reversed, because there was no averment, *that the plaintiff had given the defendant notice of the sale and price of the rest*, which was a thing of his own private knowledge.

Richards v. Carvamel. Hob. 68.

So where the *assumpsit* was to pay to the plaintiff so much on his coming into *Somersetshire*; judgment was arrested after a verdict, because the plaintiff had not averred in his declaration *notice of his coming, and a request to the defendant to pay.*

——v. Henning. Cro. Jac. 432.

But where the notice is not to come from the plaintiff himself, but from a collateral matter which may be within the defendant's own knowledge, (as to pay as much as *I. S.* does,) there no notice or request is necessary from the plaintiff.

Per Eyre, Just. 1 Stra. 89.

And where a notice and request are necessary, *a special request must be averred*; for the general averment in all declarations of *licet sæpius requisitus* will be insufficient; that is will not be considered as sufficient notice: it ought to be set forth that the Court may judge if they were sufficient.

So that the rule seems to be,

Siliman v. King. Cro. Jac. 183. Hill v. Wade. Cro. Jac. 523. Birks v. Tripper. 1 Saund. 33.

"That where the defendant is chargeable on a collateral "matter and not on a mere debt, there ought to be a re- "quest precisely alleged in point of time, place, &c. But "where the *assumpsit* is for a preceding debt, which was "due before, then the general allegation of *licet sæpius re-* "*quisitus* is sufficient; for the bringing the action is a re- "quest." Though *Eyre*, Justice, denied those cases from *Croke* to be law.

Frampton v. Coulson. 1 Wils 38.

Therefore in declaring on a note of hand no request is necessary, for it acknowledges a debt, and the bringing the action is a request.

Wallis v. Scot. 1 Stra. 88.

So where the plaintiff declared that the defendant, in consideration that he would make him a set of sails worth 45*l*. promised to pay so much on request, and averred that he made the said sails, and that the defendant *though often requested*

quested had not paid; to this was a special demurrer for cause, that there ought to be a special request laid; but it was over-ruled, for on the making of the sails the money immediately became due.

"So in all cases where money is to be paid on an executory consideration the plaintiff should set out the day "when and place where the consideration was performed, "because it is traversable." Morris v. Kirke. Cro. Eliz. 73.

Therefore in *assumpsit*, where the plaintiff declared that, in consideration that he would deliver, &c. the defendant undertook to pay, &c. and in fact says, that he did deliver, but does not allege *a place where*; the defendant demurred for want of a venue, and the declaration was held ill; for a consideration executory is traversable, and therefore the place necessary to be shewn. Sexton v. Miles. Salk. 22. Show. 50. S. C.

2. "Where the action is brought *on mutual promises*, they "must be both made at the same time, or else it will be "*nudum pactum*, and so no action will lie: and when they "*are to be performed at the same time*, the plaintiff in such "case need not aver performance."

Assumpsit on an agreement, where in consideration that the plaintiff agreed to deliver to the defendant a cow, he promised to give the plaintiff fifty shillings. It was held, that the plaintiff need not aver the delivery of the cow, for it was promise for promise. Nicholas v. Rainbred. Hob. 88.

So where the *assumpsit* laid was that the plaintiff had agreed to deliver to the defendant three yards one-eighth of cloth; and the defendant agreed on a certain contingency happening to pay for the same 5*l.*; but if the contingency did not happen, that he was to pay nothing. The contingency did happen, and on action brought, the plaintiff had a verdict; when it was moved in arrest of judgment, that the plaintiff had not averred the delivery of the cloth; but it was resolved, that this being promise for promise, no such averment was necessary: but if it had been that defendant undertook to pay if plaintiff *would deliver* so much cloth, there the condition would be precedent and an averment of performance necessary. Martindale v. Fisher. 1 Wils. 88.

3. "Where the plaintiff's action is to arise from some "precedent act to be done by himself, he should aver and "shew *his right* to do such act, and also *his performance* as "far as he could. For otherwise he might recover for a "consideration which he could not perform."

In *assumpsit* on an agreement to forfeit a deposit of five guineas, and also to pay another sum of 10*l.* if the defendant did not accept possession of certain premises from the plaintiff, and also pay for certain fixtures therein at a fair appraisement Luxton v. Robinson. Dougl. 598.

appraisement by two appraisers. In *assumpsit* on this agreement, it was adjudged on special demurrer, that plaintiff's declaration was ill, because he had not *shewn his right* to the premises, so that he could have delivered possession according to his agreement, and also if each was to name an appraiser that he had done so.

Phillips v. Fielding. 2 H. Black. 123.

So where the action was to recover damages for the non-performance of an agreement for the sake of a copyhold estate, and by the conditions of sale, which was by auction, it was stipulated that the purchaser should pay down a deposit and sign an agreement for payment of the remainder of the purchase-money at a certain time *on having a good title*, and that he *should have a proper surrender* of the estate on payment of the purchase-money. The declaration stated, "that the seller had been always ready and willing, and frequently offered to make a good title to the said estate, and to make a proper surrender on payment of the purchase-money." This on demurrer was held to be bad: 1st, Because the declaration had not averred *that the* plaintiff had actually made a good title and surrendered the estate to the purchaser (the defendant,) or a tender and refusal; and 2dly, Because it had not shewn what title the seller had.

"And for the same reason if the plaintiff *avers performance*, he must also shew *how* performed, that the Court "may judge if the performance is sufficient to entitle him "to the action."

Gregory v. Nevill. Cro. Eliz. 292.

For where the plaintiff declared, that being entitled to a rent-charge out of lands of which the defendant had the reversion; that the defendant promised, that if he would relinquish the rent, that he would pay him 30*l.* and the plaintiff avers that he did so relinquish the rent, and brings his action for the 30*l.*; and after verdict for the plaintiff, the judgment was arrested, for that the plaintiff in his declaration had not shewn *how he had relinquished the rent*; for it might have been *by words*, which would have been no discharge.

Austen v. Gervas. Hob. 69. 77.

So where the defendant promised to deliver an horse to the plaintiff, on the plaintiff's becoming bound to him by writing obligatory for 11*l.* the plaintiff in his declaration only averred *his offer* to become bound, and had a verdict: but judgment was arrested, for plaintiff should have averred *a tender of the bond ready sealed to defendant, and also the sum he was bound in*, for the Court to judge of the performance, which here he had not done.

Laneret v. Rivett. Cro. Jac. 503.

And if the plaintiff declares *on two considerations*, he must aver the performance of both; for the *assumpsit* on the part of the defendant shall be presumed to be founded on both considerations taken together.

4. "In

4. "In declaring in *assumpsit*, it is always necessary to set "out *for what the debt became due*, and not generally; that "the defendant being indebted, undertook to pay, &c. For "the debt might be due by *specialty*, in which case this "action would not lie." *Ante* 96.

Woodford v. Deacon. Cro. Jac. 206. Cooke v. Samburne. 1 Sid. 182. S. P.

But if it sufficiently appears from the declaration that the debt is not due by specialty, as if it is *pro operâ & labore* generally, without saying what work, it is good.

Hibbart v. Courthope. Carth. 276.

So where it was for *necessaries furnished to a sick man*, without saying what necessaries, it was held to be good: for such were *simple contracts* on the face of them.

Cripps v. Bainton. 3 Bulst. 31.

5. "In declaring in *indebitatus assumpsit* for money *lent* "and advanced, it must always be for money lent *to the* "*defendant himself.*"

[134]

For where the plaintiff declared in *Indebitatus assumpsit* for money *lent* by him *to one James Dalrymple*, at the special instance and request of the defendant, the judgment was arrested, for the word *lent* is a technical term, and imports a loan to *J. Dalrymple*; if so *he* was the debtor, and therefore the *defendant could not also be indebted*, for there cannot be a double debt on a single loan. But it had been otherwise, had the plaintiff declared for money *delivered* to such a person at the request of defendant; for then the loan had been to the defendant himself.

Marriot v. Lyster. 2 Wils 141. Butcher v. Andrews Salk. 23. S. P.

But where the plaintiff in this case declared for money *lent to the defendant's wife* at his request; and it was attempted to arrest the judgment on the authority of the cases above, the Court held, that a loan to the wife at the husband's request, was a loan to the husband himself, and the plaintiff had judgment; for the husband and wife are but one person.

Stephenson v. Hardy. 3 Wils. 388.

6. "The breach assigned in the declaration should always "follow the undertaking stated, or the plaintiff cannot have "judgment."

For where in *assumpsit* the plaintiff declared that the defendant undertook to *deliver an horse* of the plaintiff's in *as good plight as he borrowed him*; and the breach assigned was, that he had not *delivered him at all*. The defendant had judgment; for the breach was inconsistent with the undertaking.

Wright v. Johnsen. 1 Vent. 64.

7. In *assumpsit* by the defendant in consideration of 20*l.* to deliver on or before such a day, as the 5th of *June*, corn or such, that the defendant *did not deliver on the 5th of June* is a good assignment of the breach, though the defendant might have delivered it before that time: for the defendant might, on *non assumpsit*, give a delivery before that day in evidence; and as the defendant could not make a tender before that day,

Harman v. Owden. Salk. 140.

day, it shall not be presumed that the plaintiff was there to receive it sooner.

8. " If the plaintiff in his declaration undertakes to re-
" cite a statute, *and that statute is the ground of the action,*
" and misrecites it, it is fatal: for so the plaintiff would not
" prove his whole declaration, the statute being the first
" thing to be proved."

Rann v. Green. Cowp. 474.

*[135].

*In *assumpsit* to recover forty shillings due to the plaintiff as vicar of *Trinity* parish, *Coventry*, under an order made by the chancellor and the two chief justices, for the payment of tithes, in pursuance of a power given to them for that purpose by statute 4 & 5 *Phil. & Mary*, the plaintiff in his declaration stated the statute to be the 4th of *Phil. & Mary*. For which variance he was, on producing the statute, and it appearing to be the 4th & 5th *Phil. & Mary*, nonsuited.

9. " In *assumpsit*, *the day of the promise* laid in the decla-
" ration is not material."

Cole v. Hawkins. 1 Stra. 21.

For where the plaintiff in this action declared on promises to pay the 16th of *Jan.* 1706, the defendant pleaded *actio non accrevit infra sex annos*. The plaintiff replied, that a bill had been filed 23d *Jan.* 1714, and that the cause of action arose within six years before. Defendant demurred generally and shewed for cause a departure: for that if the *assumpsit* was within six years preceding the 23d *Jan.* 1714, it would not be on the day laid in the declaration, *viz.* 16th of *Jan.* 1706, which is more than seven years, and so there was a departure in assigning a different day: but the demurrer was over-ruled, for this being a parol promise, the time alleged in the declaration is only matter of form, not of substance; so that not being a departure in a material part, *there should have been a special demurrer for want of form*, not a general one.

Howard v. Jennison. Salk. 223.

Matthews v. Spicer. 2 Stra. 806. S. P.

So where the plaintiff, who was a taylor, brought this action, and six several promises were laid, *all upon the 16th of October*, the defendant pleaded *infra ætatem* to all generally. The plaintiff replied as to *two* of the promises, that the defendant was at the time of making these of *full age*, and as to the rest, that they were *pro necessario vestitu*. The defendant demurred, for that the promises being all laid on the same day, that it was repugnant, that he could not be at the same time of full and not of full age: but it was held, that the time was a circumstance in no wise material, nor part of the issue; that the plaintiff was not tied to a precise day in his declaration, and if the defendant force him to vary, that it was no departure.

King v. Bray. Sid. 68.

And so where the cause of action is to arise *on a request*, the day of the request is not material; for it may be laid at one

one time in the declaration, and a request at another time given in evidence.

*So where the plaintiff declared on promises; the breach was assigned on the 6th of *November*, and the declaration was of the same day, being the first of *Michaelmas* term: to this there was a special demurrer for cause, that the declaration bore date before the cause of action; the promise being laid the first day of the term, and there being no fraction of a day allowed: but the demurrer was over-ruled; for the first day of term is only to be reckoned from the time the court began to sit, and so the breach might precede it. Pugh v. Robinson. 1 T. Rep. 116. *[136]

"But where the day makes a part of the contract, and "so is of substance, in that case assigning a different day in "the replication from that assigned in the declaration, "would be a departure."

As is the case *in an action on a promissory note*, in which the day is material, and of substance, 2 *Stra.* 806. S. C. As where the plaintiff declared on a promissory note, dated in 1704, and the defendant pleaded *actio non accrevit infra sex annos*; the plaintiff replied a bill filed *in* 12 *Ann.* 1714. For this judgment was arrested. Stafford v. Forcer. quot. 1 Stra. 22.

9. In *assumpsit* on an *insimul computasset*, the *time* and *place* should be laid where the account was settled, or it will be error: for which in this case judgment was reversed. Desborough v. Kelly. Ld. Raym. 533.

10. In declaring on a *bill of exchange* against the acceptor, it is sufficient in the declaration to allege generally *that he accepted it* without averring *that it was in writing*; for such acceptance is only necessary to charge the drawer with costs and damages, and has no operation as to the action between the holder and the acceptor. Erskine v. Murray. 2 Stra. 817.

As by the custom of merchants an executor or administrator may indorse over a note or bill of exchange. If indorsee brings an action against the maker of a note, he shall not be called upon for a profert of the letters of administration, for they are in the indorser's hands, not in his. Rawlinson v. Stone, 3 Wils. 1.

So where payee of a bill of exchange being indebted to the testator, indorsed over to the executors a bill of exchange; it was adjudged, that the executors might declare *as such* against the acceptor. King v. Thom. 1 T. Rep. 487.

11. The plaintiff declared in *assumpsit* for goods sold and delivered, but omitted in his declaration to say, "In consideration of which the said *W.* undertook and faithfully promised," &c. After a judgment by default, it was reversed Lee v. Welsh. 2 Stra. 793.

versed upon error, there being no promise laid in the declaration.

12. In declaring under the *statute of frauds*, the plaintiff need not in his declaration shew *any note in writing*; but it will be sufficient for him to produce it on trial.

Truman v. Hurst. Mich. 1 T. Rep. 40.

13. In *assumpsit* against *an infant*, one count in the declaration was *an account stated*, and there was a general verdict; judgment was arrested: for such count is bad as against an infant, who is not to be presumed to be competent to enter into an account.

Bullock v. Jackson. West. Sitt. Hill. 1773. MSS.

14. The surviving partner may bring an action for goods sold and delivered in the lifetime of his partner (*ante* 117.); and in such case the promise should be laid to have been made to both in the lifetime of the deceased partner, and the breach assigned that the defendant had not paid to the plaintiff and his partner in the lifetime of his partner, nor to the plaintiff since the partner's death.

Rigg v. Wilmer. 1 Stra. 697.

15. In *assumpsit* by the assignee of a bankrupt, the declaration stated, that the defendant was indebted to the bankrupt, and being so indebted assumed to pay *him*, without any *assumpsit* to the plaintiff (the assignee) through the whole declaration. It was held well on demurrer, being like the case of an executor who always declares on a promise to the testator.

"In *assumpsit* by the assignees of a bankrupt, if it is upon "a contract entered into (as for goods sold) by the bankrupt "before his bankruptcy, they must declare *as assignees*; but "on a contract entered into by the bankrupt after his bankruptcy, they may declare in their own names, and not as "assignees."

Evans v. Mann. Cowp. 569.

For where the bankrupt had been a lighterman, and after his bankruptcy sold a lighter to the defendant, who paid him 30*l.* part of the purchase, the assignees discovering the matter, insisted upon having the lighter delivered to them, or the purchase-money paid to them; on which the defendant agreed to pay them the remainder of the purchase-money, deducting the 30*l.* for which the present action was brought, and they declared *without stating themselves as assignees*. The objection was taken as to this mode of declaring, but overruled; and on a motion for a new trial, it was resolved, that as the property belonged to the assignees, *that the bankrupt was to be considered as their agent in the sale*, which they afterwards adopted, and that therefore the declaration was good.

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16. In an action by an *executor*, if the action is brought on a contract made by himself respecting the goods of the testator, he need not name himself executor.

But

But the plaintiff cannot join in the same action a demand due to himself and another as executor or administrator; for the costs to be recovered are entire, and he can never discover how much he is to have as administrator or executor, and how much as his own.

Rogers v. Cooke. Salk. 10. Hooker v. Quilter 1 Wils. 171. S P.

But an executor may join in the same declaration several counts for money had and received by the defendant to the use of the testator, and *to the use of the executor as such.*

Per Buller Just. 3 T. Rep. 660.

And in declaring *against* an executor on a promise by his testator, it is not necessary to set out in the declaration that the *defendant has assets;* for if he has not, it should lie on him to discharge himself by his plea; and if he pleads *non-assumpsit*, he has lost that advantage.

Bigg v. Malin. Hutt. 27. Cro. Eliz. 59. S. P. Legate v. Pinchion, Cro. Jac. 293.

2. OF THE EVIDENCE ON THE PART OF THE PLAINTIFF.

1. "As the plaintiff is bound to declare on a special "agreement, where there is such, he ought to prove *the "contract stated in* his declaration expressly as laid, or he shall "be nonsuited."

The plaintiff in this case declared on an agreement by the defendant, to deliver him *good merchandizable corn.* Proof of an agreement to deliver *good corn of the second sort*, was held not to support the declaration.

Anon. 1 Ld. Raym. 735. per Holt.

So where the declaration was, that the defendant had agreed to sell *so many bushels of corn*, and breach assigned in the non-delivery. In evidence it was proved, that the contract was for the sale of so many *bushels Hartland Quay measure*, which was half a gallon more than the standard *Winchester* bushel; this was held to be a fatal variance, for the bushel mentioned in the declaration could only mean the statute standard bushel.

Hockin v. Cooke. 4 T. Rep. 314.

So where the agreement declared on was to deliver to the plaintiff stock *on the 22d of August*, and upon the trial the evidence produced from the broker's book was to transfer *on the opening*: though the broker swore that the 22d of *August* and the opening were the same, yet it was held a variance, and plaintiff was nonsuited.

Payne v. Haye, Oct. Stra. 74. Bull. N. P. 145.

"For the agreement being the gist of the action, must be "stated truly, and the *whole of it* ought to appear on the "record."

*For where the plaintiff declared on a contract, whereby he was to buy of the defendant all the fat and tallow which the defendant should have to dispose of for twelve months, from 31st of *Jan.* 1784, at four shillings per stone: the agreement proved was, that the plaintiff was, as stated, to give four shillings per stone, but further, that *if he gave any*

Churchill v. Wilkins. 1 T. Rep. 447. *[139]

other person more, he was to give the same to the defendant. For this variance *Eyre*, C. B. nonsuited the plaintiff; and on a motion for a new trial, the Court held the judge's direction to be right, for that the contract produced in evidence was different from that declared on, and so the variance was fatal.

"But where an agreement *is in the alternative*, and it is "in *the option of the party bringing the action to sue on either* "*part of it*: where he does so bring his action on one part, "he need not state the whole of the agreement, for having "made his election as to one, it then becomes absolute, and "he need only state so much, as gives him a right to sue; "but where the option of the alternative is in the defendant "it is otherwise."

Leyton v. Pearce. Dougl. 15. 1 T. Rep. 448.

As where under the lottery act, 17 *Geo.* 3. *c.* 46. "A penalty of 500*l.* is given against any person who shall in consideration of money, undertake to *pay any sum of money*, on the event of any ticket or chance in the lottery." The defendant gave a policy, whereby he undertook *either* to pay a sum of money, viz. 20*l.* or give an undrawn ticket in case the number of the policy was drawn. The plaintiff sued for the penalty under the statute, as an agreement by the defendant *to pay money* in consequence of the drawing of the ticket; but it was decided, that under this agreement *the defendant had an option*, either to pay money *or deliver a ticket*, therefore the plaintiff could not declare as for a positive contract to pay 20*l.* and that no action would therefore lie against the defendant, as having the option, he might perform the part not prohibited, that is, deliver an undrawn ticket.

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Weaver v. Burrows. M. 12 G. 1. Bull. N. P. 139. 1 Stra. 648. S. P.

And it has been held that though the plaintiff has a count in his declaration on a *quantum meruit*, as well as on a special agreement, yet if at the trial he proves a special agreement, *but different from that laid in the declaration*, the plaintiff cannot recover on either count; not on the first count, because of the variance, nor on the second, because there was a special agreement.

King v. Robinson. Cro. Eliz. 79.

So if the promise alleged be proved, yet if it appear to be made on *a different consideration*, from that stated in the plaintiff's declaration, or if it be proved to have been made on that consideration *and another*, it shall not support the declaration.

Bradburn v. Bradburn. Cro. Jac. 169.

So where divers considerations are alleged, some good and sufficient, others idle and vain: if those which are good be proved, it is sufficient, though the plaintiff fails in proof of the others. But if all the considerations alleged are good, all must be proved: for the promise shall be deemed to be founded on all these considerations which are good and lawful. *Ante*, 133.

"Such

"Such is the case of *assumpsit* generally, but if the plaintiff declares on a special agreement in *indebitatus assumpsit*, "and has also other general counts in his declaration, if he "*fails in proving* the special agreement, he may go into evidence on the general counts." Harris v. Oke, at Winchester, 1759. Bull. N. P. 139.

The rule here laid down seems now to be settled, though formerly the question seemed to be doubtful. It first occurred before Lord *Mansfield*, who in the last case permitted the plaintiff to go into evidence on the general counts, he having failed to prove the special agreement; and this was afterwards confirmed by this case, where in *assumpsit* the plaintiff declared on special agreement to pay his proportion of the expense of a suit, and the plaintiff failed in proving it, he was allowed to resort to the general counts for money laid out and expended, and recovered. Payne v. Bacomb. Dougl. 651.

"But where the plaintiff declares on a contract which is "entire, the plaintiff must recover on the whole contract "taken together, and cannot either apportion or recover on "the common counts."

For where the intestate had entered himself as a sailor on board the defendant's ship at *Jamaica*, and defendant gave him a note, "promising to pay him 30*l.* ten days after the ship's arrival *at Liverpool, provided he proceeded, continued, and did* his duty, as second mate on board that ship." He did sail on the voyage, but died a few days before its completion. His administratrix now brought *assumpsit* for work and labour, when it was held that she could not recover; for that the contract was entire, and depended on a condition precedent to be performed, until which time no right of action accrued, and being so entire, there could be no apportionment, nor the plaintiff be allowed to go on the *quantum meruit*. Cutler, Admix. v. Powell. 6 T. Rep. 320. Vid. Countess of Plymouth v. Throgmorton. Salk. 65. post 363.

2. "The plaintiff's proof must correspond with his title, "as laid in the declaration."

For where the action was for money had and received to the use of the plaintiff, and the evidence was, that the money had been received by the defendant on account of the plaintiff's wife *who was an executrix*, the plaintiff was nonsuited: for the contract to pay was proved to be to the person *in a different capacity* from that declared on. Anon. Salk. 282.

So where the plaintiff declared as executor, on a promise to the testator, and on *non-assumpsit*, *infra sex annos* pleaded, gave in evidence a promise made *to himself* within that time, It was held that it should not have been given in evidence in support of the declaration, but that the plaintiff should have declared on a promise to himself. Dean v. Crane. Salk. 28.

"So in *assumpsit* against several, *a joint debt or contract* "must be proved; for otherwise, the proof would not cor- "respond with the declaration." Bull. N. P. 129.

"But

"But where the person bringing the action has looked "to the faith of several partners, who are in business to- "gether, and has relied on their joint credit, though but "one only of the partners has acted, the other partners "shall be charged, unless they shew a disclaimer, and proof [141] "of the act of one shall charge them all."

—v. Layfield & al. Salk. 292.

Therefore, where *Layfield* and the other defendants were bankers, and *Layfield* sold a lottery ticket in the *Double* exchange lottery (in which several bankers were trustees) to the plaintiff, and undertook to pay the prize arising from it, the other partners were held to be liable, no disclaimer appearing, for the lottery having been conducted by bankers, the plaintiff appeared to be well grounded in looking to the joint credit of *Layfield's* partners.

Thompson v. Spencer. Pasch. 8 Geo. 3. Buller. N. P. 129.

3. "It was formerly the opinion, that on a count of "*insimul computasset*, that the plaintiff was obliged to prove "the exact sum laid, but that idea is now exploded, and the "plaintiff may now recover part of the sum demanded on "his count as well as on any other."

Lincoln v. Parr. 2 Keb. 781.

But the court will not admit any evidence of an account *current and unliquidated*; for that would involve the court in a tedious examination. The account therefore must always be exhibited *as an account stated*. The practice now is to refer cases of this sort to arbitration.

4. "One of the most usual counts in declaring in this "action is for *goods sold and delivered*; as to which it is "enacted by statute 7 *Jac.* 1. *c.* 12. *That the shop-book of* "*a trader shall not be evidence after the year*; but it is not evi- "dence within the year, except under particular circum- "stances, as where no better evidence can be had; that is, "if the person is living who delivered the goods, he must "be produced, for that is the best evidence which can be "had."

Pitman v. Maddox Salk. 690.

But where it was proved, *that the servant who made the entries was dead*; proof of that and of his hand-writing to the entries, and that he was accustomed to make entries, was held to be good evidence, and that no other proof of the delivery was necessary: for it is similar to a witness's attestation to a bond.

Price v. Lord Torrington. 1 Salk. 285.

So where in an action for beer furnished to the defendant, the evidence of the delivery was, that it was the usual way of the plaintiff's dealing for the draymen to come every night to the clerk of the brewhouse, and give an account of the beer delivered out: to which the draymen set their hands: this being proved, and that the drayman was dead who had delivered the beer to the defendant, but that it was his hand-writing subscribed to the book, it was held to be sufficient evidence. But had the drayman been living, he must have been produced.

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But

But where the plaintiff to prove the delivery of wine to the defendant, produced a book which belonged to his cooper, who was dead, but whose name was set to several articles, as wine delivered to the defendant, and a witness was ready to prove his hand writing; Lord *Raymond* refused to admit it; saying it differed from Lord *Torrington's* case, for there the witness saw the drayman (who made the delivery) sign every night. Clerk v. Bedford, Mic. 5. Geo. 2. Bull. N. P. 282.

"And where the witness who made the delivery is himself called, he may use his book of accounts to refresh his memory, but not further."

In an action for goods sold, the witness who proved the delivery took it from an account which he held in his hand, which he said was a copy of the day-book which he had left at home; and it being objected that the original ought to have been produced, Mr. *Baron Legge* said, that if he would swear positively to the delivery from recollection, and the paper was only to refresh his memory, that he might make use of it; but if he could not swear to the delivery further than as finding them entered in his book, that the original should be produced; and the witness saying that he could not swear from recollection, the plaintiff was nonsuited. Tanner v. Taylor. Hereford Lent Ass. 1756. MSS.

So a man's book of accounts is no evidence for him, though it may be against him, for it cannot be better evidence than his own testimony, which is inadmissible. Anon. Lord Raym. 745.

"But where a man uses books to refresh his memory as to entries they must be entries *made by himself.*"

For where to prove payment of a draft at a bankinghouse, a clerk was brought as a witness, who produced one of the books of the house, wherein payment was entered: being asked if the entry was made in his own hand writing, he said not; that it was the hand-writing of a person then a clerk in the house (whose hand-writing he swore it was); but that the clerk was gone to the *East-Indies*, and was not likely to return. It was objected that this evidence was inadmissible. On the other side it was contended, that this case was analogous to that of admitting proof of the execution of any instrument where the witness to it happens to be abroad, by proving his hand-writing. Lord *Kenyon* admitted the law to be so with respect to proofs of written instruments, but in the present case held, that the evidence was inadmissible. Cooper v. Marsden. Espin Cas. N. P. 1.

But where the entry was made by the witness's master, who was one of the defendants, but he saw it just after it was made, and it corresponded with what he then knew to be the fact, Lord *Kenyon* ruled, that he might use the book to refresh his memory as to the delivery. Digby v. Stedman. Espin Cas. N. P. 338.

5. In a trial concerning the delivery of goods according to agreement, *the factor who made the agreement* was admitted as Dixon v. Cooper. 3 Wils. 40.

as a good witness, *though he was to have a shilling in the pound on the sale:* for he was a mere go-between the buyer and seller, and so might be a good witness for either, as having no interest more on one side than the other.

Shelly's case. Salk. 296.

1. In *assumpsit* against an executor, and *plene administravit* pleaded, the plaintiff must notwithstanding *prove his debt*, or he shall recover but one penny damages though there be assets; for the plea only admits the debt, but not the quantum of it.

Ld. Fr. Seymour. v. Duke of Somerset. Rolls 1770. Cleverly v. Brooke. Winchest. Sum. Ass. 1772. Coram Justice Ashhurst.

In an action against an executor, a case was cited, where on a bill filed for a legacy, it was said to have been ruled at the Rolls, that *payment by the executor, of interest on a legacy,* was sufficient proof of assets.

Gann v. M'Culloch. Sitt. Trin. 1755. MSS.

*7. In this action the defendants having *offered to pay a sum of money in discharge of the debt*, is often offered as proof of the admission of the debt, but it is not conclusive; for it was ruled by Lord *Mansfield* in this case, which was by an inn-keeper for an election bill, that if a lesser sum was offered on account of a debt due, and in part of a bill, that it was good evidence; but if it was offered as a compromise, it was no evidence at all, and ought not to be received, for a man may wish to buy peace at any rate: and if the offer be made to settle disputes, it ought not to be heard, as otherwise it would be impossible to enter into any treaty for accommodation at all.

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8. "It is a general rule, that the husband or wife shall "not be admitted an evidence for or against each other."

Hill v. Hill. 2 Stra. 1094.

And therefore in an action for wages earned by the wife, Ch. Just. *Lee* refused to let the wife's confession of a receipt of 20*l.* be given in evidence.

Bentley v. Cook. Trin. 24 G. 3.

So where in an action for goods sold and delivered, brought by the plaintiff as a *feme sole*, the defendant brought the husband to prove that she was a married woman; he was admitted by Justice *Buller*, and the plaintiff nonsuited: but the nonsuit was set aside, on the ground of the impolicy of permitting the husband or wife to be witnesses for or against each other.

"But to this there are some exceptions."

1st, "Where the husband was not concerned in the action, "but *the evidence was collateral* to discharge the defendant "by charging the husband."

Williams v. Johnson. 1 Stra. 504.

As in an action against the defendant for his wife's wedding clothes; the defence was, that the goods were furnished on the credit of the wife's father, and the mother was called to prove it, and allowed to give evidence to that effect though it charged *her* husband.

2dly,

2dly, So where the action was for nursing the defendant's child; the Chief Justice admitted the wife of the defendant's declarations of her agreement to pay four shillings a week, as evidence to charge her husband: this being a matter usually transacted by women. Anon. 1 Stra. 527.

9. In actions upon policies of insurance, as to what shall be proof of interest and of the loss, it has been decided,

*In *assumpsit* on a policy of insurance to prove the bill of lading the consignee was called, who swore *that he received part of the cargo* under that bill of lading, and that was holden to be sufficient without proving the captain's hand: then to prove the nature of the loss, the captain's protest was offered in evidence, and it was objected to, as the captain himself should have been called, or his deposition had on a commission. *De Grey*, Ch. Just. held, that the protest was not sufficient evidence, without some parol evidence how the loss happened, particularly here where the loss happened in port, when there might be a variety of persons who saw it besides the sailors, who might be gone abroad. The master's protest is evidence of every thing against himself, but not how any particular loss happened. Pitcher v. Redshaw. Guildh. Sitt. Trin. 1772. MSS. *[144]

"But *strong presumption*, if the best evidence that can be "had, shall be admissible and good."

As in *assumpsit* on a policy of assurance; proof that the ship has never been heard of will be good to prove a total loss. Green v. Browne 2 Stra. 1199.

To disprove barratry in action on a policy of insurance, and to shew that it was done by consent of the owners, the captain is an inadmissible witness unless released by the underwriters. Bird v. Thompson. Espin. Cas. N. P. 339.

10. "In other cases the best evidence to be had must "always be given. And therefore in declaring on a note "of hand, or bill of exchange, or such contract in writing, "*the note, bill, or contract, must itself be produced in evidence*, "except the original be lost; in which case a copy is good "evidence."

But where an original note has been lost and a copy is tendered in evidence, sufficient probability must be shewn to the court to satisfy them as well of the loss as that the original note was genuine, before plaintiff will be allowed to read it. Goodeir v. Lake. 1 Atk. 446.

So if a man destroys a thing intended to be evidence against him, a small matter will supply it: as where the defendant tore his own note of hand, a sworn copy was admitted as good evidence. Per Holt, Mic. 10 Geo. 2. 1 Lord Raym. 731.

In this case in an issue out of Chancery to prove the handwriting of a person whose name was subscribed to a declaration Gould v Jones. 1 Bl. Rep. 384.

tion of trust, the evidence of a person who had corresponded with him, though he had never seen him write, was admitted, and held good.

Willis v. Singer, Taunton Lent Ass. 1785. MSS.

But in this case, which was debt on a bond, and to prove payment, the defendant's counsel produced a receipt, with the name of the person who it was said was used to receive money and do business for the plaintiff; but his hand-writing was only proved by a witness, who had received letters from him but had never seen him write; it was contended on the authority of the above case, that such evidence was sufficient; but Justice *Buller* said, *that was only because the writer lived abroad, and so that persons who had seen him write were out of the reach of a subpœna*; he therefore rejected the evidence, and the plaintiff had a verdict.

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Gatteridge v. Smith. 2 H. Bl. 374. Watkins v. Towers. 2 T. Rep. S. P.

But where money has been paid into court, in an action brought on any written instrument, it supersedes the necessity of proving the execution of such instrument, as here, in the case of a bill of exchange.

11. "The sentence of foreign courts of justice is conclusive evidence here of all matters of which they have "cognizance."

Barzillay v. Lewis. Trin. 22 G. 3. Park. Ins. 410.

As where the action was to recover a loss on an insurance of a ship from *Liverpool* to *Amsterdam*, warranted *Dutch* property; in evidence it was proved that the vessel in her voyage to *Amsterdam* had been captured and carried into *St. Maloes*, where she was condemned as lawful prize, as an *English* ship. The court of *K. B.* were unanimously of opinion, that this sentence legally pronounced by a court of admiralty of *France*, having jurisdiction of such questions, should be decisive of the question as to the neutrality: and the defendant (the insurer) had judgment.

"Neither will the courts here examine into the grounds "of the condemnation made by the foreign court, nor "question its legality (*Saloucci* v. *Woodmass*, *Hil.* 24 *Geo.* 3.) "unless the grounds of the sentence appear on the face of "it, and they manifestly contradict the conclusion the foreign courts have drawn, or are unjust, and contrary to "the law of nations."

Saloucci v. Johnson. Trin. 25 G. 3. Park. Ins. 415.

As where the action was on a policy on the ship *Thetis*, a *Tuscan* ship, *warranted neutral property*. It was found by the jury that the ship and goods were neutral, that she had been captured by a *Spanish* privateer and condemned. 1st, For refusing to be searched, and firing on the *Spaniard*: 2dly, For not having a charter-party on board. The captain had answered these two grounds; 1st, By stating that he refused to be searched, and fire on the *Spanish* ship, she having hailed her under false colours: 2dly, That having taken in goods *by the piece*, that no charter-party was necessary. The Court held, that there were sufficient grounds to shew

shew the condemnation not to have been legal, and that therefore it should not conclude the insured.

12. To prove that there were no effects of the drawers in the hands of the acceptor at the time of the bill drawn, the acceptor is an admissible witness. Staple v. Ekines. Espin, Cas. N.P. 333.

I now proceed to the pleadings and evidence on the part of the defendant.

2. OF THE PLEADINGS ON THE PART OF THE DEFENDANT.

" 1. The plea should always answer to the promise or " undertaking as laid in declaration."

Therefore in *assumpsit by the assignees of a bankrupt*, the defendant pleaded that the cause of action did not accrue *to the bankrupt* within six years; on demurrer it was held ill, for the plea does not answer to the promise laid, which is *to the assignee*, and it precludes the plaintiff from proving any promise made to himself, if issue was joined on that plea. Skinner v. Rebow. 2 Stra. 919.

" So the plea must answer to every part of the declara- " tion." Woodward v. Robinson. 2 Stra. 302.

For if the plea be pleaded to the whole promise, and is an answer but to a part, the whole plea is nought, and the plaintiff should demur. But when it is pleaded to and answers but to a part, it is a discontinuance. As in *assumpsit* on three several promises, and the plea only goes to two of them, it is a discontinuance as to the third, and if it be a record of the same term, the plaintiff may have judgment by *nihil dicit* for so much as is uncovered by the plea. Weeks v. Peach. Salk. 179. Markett v. Johnson. Salk. 180.

2. " Where the promise is to arise from any consideration " to be performed; when it is performed, the defendant " cannot traverse the consideration alone or *by itself*, for it " is then incorporated and coupled with the promise: but " where it is executory, the plaintiff cannot bring his action " till the consideration is performed; and if the plaintiff " brings his action before the consideration is performed, " the defendant should traverse the performance and not the " promise, for they are distinct in fact." Lampleigh v. Braithwaite. Hob. 105.

" So the defendant cannot plead in bar, that he revoked " and countermanded his promise." Cro. Jac. 483.

For where the plaintiff declared that in consideration that he would solicit and conclude a certain business for the defendant which he had with *J. S.* that he would pay, *&c.*, but before that he had concluded it, that the defendant had countermanded him after he had had great pains and trouble: it was adjudged, that he should recover in *assumpsit the whole sum* promised, and not be confined to a *quantum meruit* for what he had done. Howe v. Beech. 3 Lev. 244. In Cam. Scac. Winter v. Foweracres. 2 Roll. Rep. 39. S. P.

5. "*Matters of law* that do not go to the gist of the action, but to the discharge of it, *must be pleaded*: such "as accord and satisfaction, the statute of limitations, "&c."

1. *Accord and satisfaction* is a good plea in *assumpsit*: but it must be performed at the time of the plea.

Shepherd v. Lewis. Sir J. Jones 6.

In *assumpsit* the defendant pleaded an accord between him and the plaintiff, to do several matters, in bar of the demand, and averred the performance *of part*, and that he had *tendered the performance of the remainder*. On demurrer, the plea was held to be ill, for accord should only be pleaded when executed; for then only it is a satisfaction.

"For a bare accord without satisfaction is no plea."

Heathcote v. Crookshanks. 2 T. Rep. 24. Vide Lynor v. Bruce 2 H. Black. 317.

Therefore where the defendant pleaded "that his several creditors, one of whom was the plaintiff, had come to an agreement to accept a composition in lieu of their respective debts from him, to be paid within a reasonable time, which he tendered and was ready to pay." This was held on demurrer to be no plea to this action for the whole demand: for it was a mere accord without satisfaction, an agreement unexecuted, and being without consideration, was *nudum pactum*, and so could not bind the party. But *per* Just. *Buller*, if the defendant *had assigned over all his effects to a trustee for his creditors* in order to pay them all *pro rata*, it had been a good bar.

Vanhatten v. Morse. 2 Ld. Raym. 787.

2. *Payment* is a good plea under this head of satisfaction; it was in this case demurred to, as amounting to the general issue, but the demurrer was over-ruled: for it admits a good cause of action though discharged by a subsequent transaction.

Abbot v. Chapman. 2 Lev. 81.

So is *payment of a lesser sum before the time*; but this must always be pleaded, for it is not a performance which destroys the being of a promise, but a collateral agreement that supplies the place of it. But such evidence may be given in mitigation of damages.

1 Stra. 426.

"And wherever accord and satisfaction is pleaded, it "must appear to the court to be a reasonable and good sat-"isfaction, and be accepted by the plaintiff as such, such "as a better security." And so

Roades v. Barnes. 1 Burr. 9. Anon. Salk. 278.

A *bond* may be pleaded in bar of a *simple contract debt*.

Draper v. Glassop. 1 Ld. Raym. 247.

2. "The *statute of limitations* is the next plea in bar I shall "consider. And this must always be pleaded, and cannot "be given in evidence on the general issue: for the plea of "non assumpsit speaks of a time past, and *relates to the "time of making the promise, but the statute refers to the "time of pleading."

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This

This plea is founded on statute 21 *Jac.* 1. *c.* 16. which enacts, "That all actions of *assumpsit* must be brought within "*six years* from the cause of action accrued."

I shall first enquire against what demands it runs. 2dly, What shall prevent it from attaching. 3dly, How it is to be pleaded.

1. *Against what Demands it runs.*

1. "The statute of limitations run against every demand "so as to be a complete bar notwithstanding any mesne acts "intervening, as the *bankruptcy*, *coverture*, &c. of the par-"ties."

For where in *assumpsit* by the assignees of a bankrupt and plea of *non assumpsit infra sex annos*, the plaintiff replied, that six years were not elapsed *at the time of the assignment*. On demurrer the defendant had judgment: for though the six years might not have elapsed at the time of the assignment, yet, as they were elapsed at the time of *bringing the action*, the statute was a good bar; for the time of limitation continued to run notwithstanding the bankruptcy and all mesne acts whatever; and it would be to defeat the statute as to all simple contracts, if an assignment at the end of five years and a half was to set all at large again. Gray v. Mendez. 1 Stra. 556.

2. The statute of limitations runs also *against bills of exchange and promissory notes*; which must be sued for within six years, or the holder will be barred. Renew v. Acton. Carth. 3. Cheevely v. Bond. Show. 340.

3. The statute is a good plea in bar to an action by an *attorney for his fees*, though insisted in this case that such demand was out of the statute, as the fees arose on a suit which was matter of record. Oliver v. Thomas. 3 Lev. 367.

4. "In the statute is an exception of *accounts current be-*"*tween merchants*, against which the statute shall not run. "That clause is fully explained by this case."

The defendants were executors of the executor of *W. W.* and to this action of *assumpsit* pleaded *non assumpserunt infra sex annos*. The plaintiff replied, that he had sued out a bill of *Middlesex* on the 3d of *June* 1755, 28 *Geo.* 2., and that the testator in his lifetime had promised to pay the demand within six years before the time of suing out the writ. The *assumpsit* was founded on a bill, and the first *item* of it was in 1746; and all the *items*, except the last, were above six years standing before the bill of *Middlesex* sued out: It was contended for the plaintiffs, that this being an account current, and the last *item* within the time of limitation, that this should draw the former *items* out of the statute. But it was ruled by Justice *Dennison*, that the clause in the statute about merchants' accounts extended only to cases where there were mutual accounts and reciprocal demands between two persons; not to cases between a tradesman and his customers, for Cotes v. Harris & al. Sitt. G. Hall. Trin. 29 & 30. G. 2.

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Wace v. Wyburn. Tr. 19. G. 3. B. R. Bull. N. P. 149.

for those are not merchants' accounts: and he was therefore clearly of opinion that the statute was a complete bar to every part of the demand of above six years standing.

"But where there are accounts current between parties, "and credit given on both sides, in such case if any *item* is "within six years it shall prevent the statute from at- "taching.

Catling v. Skoulding. 6 T. Rep. 183.

For where the testator in the year 1778 demised an house to the defendant for years; he died in 1788, when the nine years and half rent was due to him; during that time he had dealt with the defendants for candles and liquors, but there was a balance due to the testator at the time of his death to the amount of 17*l.*; the last half year's rent, and one or two of the last articles of the defendant's bill were within six years before the plaintiff's writ was sued out. The defendant pleaded the statute of limitation, and relied that the last *item* of the plaintiff's demand being within six years should not entitle him to recover for the rest: but it was adjudged, that where there were mutual accounts current, every new *item* and credit in an account given by one party to another, is an admission of some unsettled account between the parties, and equivalent to an acknowledgment of the subsisting debt, and therefore, sufficient to prevent the statute from attaching.

5. "In the same statute is a saving of the right of *infants*, "*feme coveris*, *non compos*, *persons imprisoned or beyond seas*. "So that the statute does not run against any demand that "they may have against others, provided they bring their "actions within six years after their disabilities removed."

Chandler v. Vilett 2 Saund. 120.

1. But though the rights of infants are so saved, yet may infants at any time, *during their minority*, bring their actions by their guardians, and recover any demands due to themselves.

Rochtschilt v. Leibman. 2 Stra. 836.

2. So in the cases of persons beyond sea, their rights are saved. To *non assumpsit infra sex annos* pleaded on a bill of exchange by the defendant, the plaintiff replied, that he had been beyond sea till such a time when he brought his action, and this was held good. The principal point in this case was, whether this clause in the statute extended to actions of *assumpsit*, it being contended that it was confined to actions for words; but that was over-ruled.

"And where the *action is joint, if any of the parties reside in England* and the six years run, the demand is barred."

Perry & al. v. Jackson. 4 T. Rep. 516.

For in this case, which was an action by the payees of a bill of exchange against the drawers: the bill was drawn from *America* and dated *A. D.* 1767, on *London*, and the acceptor did not pay: plea of the statute of limitations. The plaintiffs replied, That when the cause of action accrued, *one of*

of them was abroad, and that the action was commenced within six years after his return. To this was a general demurrer, and adjudged for the defendants. For that as one partner might release a joint action, or by his acknowledgment take a debt out of the statute of limitations: so if any of the parties is in *England* when the cause of action accrues, he ought to sue on the bill, though the rest are abroad.

"But this clause in the statute only extends to persons "who are *actually beyond seas*."

For where to *non assumpsit infra sex annos*, the plaintiff replied, That when the cause of action accrued he was resident in foreign parts out of the kingdom of *England*, viz. *at* Glasgow *in* Scotland, and therefore could not bring his action sooner. This replication was held ill on demurrer, for the exemption did not extend to him, as *Scotland* was not a foreign part within the meaning of the statute, the express words of which are *beyond the seas*.

King v. Walker. 1 Bl. Rep. 286

Therefore a foreigner or person resident abroad shall never be barred from bringing his action, from any length of time while out of the kingdom; for the statute does not begin to run till he has come into it; though any of the persons who are under the disabilities mentioned in the statute, may nevertheless during the time such disabilities exist, bring their actions.

Strithorst v. Greene. 3 Wils. 145. [150]

The plaintiff was therefore never barred in this action by reason of his own absence from the kingdom; but as it often happened that *the defendant was out of the kingdom*, and though he could not be sued, yet the time ran to bar any demand against him: it was therefore enacted by stat. 4 & 5 *Ann. c.* 16. "That where any persons against whom there "is cause of action shall be beyond sea at the time of such "cause of action given or accrued, fallen or come, that the "persons who shall have such cause of action shall have lib-"erty to bring their action against them within such times "as are limited for bringing the said action by stat. 21 *Jac.* "1. *c.* 16. after their return."

6. In the case of *executors*. If the six years be not elapsed at the time of the testator's death, if *the executor takes out proper process within the year*, it will save the bar by reason of the limitation, even though the six years within which the demand accrued be elapsed before process sued out. And this by the equity of the 4th section of stat. 21 *Jac.* which gives a year to commence a new action, in case the first judgment has been arrested or reversed.

Cawer v. James. Tr. 15 G. 2. C. B. Bull. N. P. 150.

So if the executor brings an action, but dies before judgment and the six years run, *his executor may notwithstanding bring his action; but he must bring it within one year after the death of his testator*, unless he has been delayed by suits for the administration, or such like cause.

Wilcocks v. Huggins. 2 Stra. 907. Fitzgib. 81.

It

Smith, Exec. of Cod. v. Hill. Exec. of Clark. 1 Wils. 134.

It should seem that if an executor is out of the kingdom, that the clause of the statute extends to him: but in all cases, if the plaintiff has been in the kingdom when the cause of action accrued, from that time the statute begins to run even though he then departs from it: so that if he, (or if he dies) his executor or administrator, does not bring the action within six years from the time of the cause of action first accrued, the statute is a complete bar.

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7. "In all cases where money is to be recovered back "where it has been paid by mistake, or for a consideration "which has happened to fail, the statute of limitations begins to "run *from the time the money was so paid*, for from that time "the right to recover it back accrued."

Bree v Holbech. Doug. 630.

As where the defendant was administrator to his uncle *W. H.* and found among his papers a mortgage deed for 1200*l.* which he assigned for that sum to the plaintiff, it was afterwards discovered that this deed was a forgery; but *that it was unknown to the defendant at the time he made the assignment*. This action was brought to recover back the 1200*l.* so paid, to which the defendant pleaded the statute of limitations, he having receiv d the money from the plaintiff six years before; and it was held to be a good bar though contended that the statute should only begin to run from the time the fraud was discovered, which was within six years. But it was held, that if any fraud appeared in the defendant, as if he knew when he made the assignment that the deed was a forgery, that it might take the case out of the statute.

Cary v. Stephenson. 2 Salk. 421.

But where money of a person who had died intestate had been received by the defendant before administration was granted to any one, it was held that the statute should not begin to run from the time of receiving the money, *for then no one had a title to receive it*: but it should begin from the time of the administration granted.

2. *What shall prevent the statute from attaching.*

Bland v. Haselrig. 2 Vent. 151.

1. "The first is a *promise by the defendant to pay* the debt "after the six years have elapsed; for this is a revival of the "*assumpsit*, and no new consideration is required: for the "plea admits a cause of action before six years."

Yea, Bart. v. ——. Mic. 1 Geo. 3. B. R. Buller N. P. 149.

As in *assumpsit* on a promissory note, and *non assumpsit infra sex annos* pleaded: on the trial it appeared that the defendant was surely in the note for *J. S.* and that six years were elapsed since the note was given; but that upon demand within the six years, the defendant said, "you know I had not any of the money myself, but I am willing to pay half of it." The court were of opinion, that this promise took it out of the statute.

"And

"And a *conditional promise* to pay will take the demand "out of the statute, as much as an express one."

In *indebitatus assumpsit* for goods, and *non assumpsit infra sex annos* pleaded, the plaintiff gave in evidence, that the goods were sold above six years ago; and that the defendant being requested to pay, denied that he had bought the goods: but further said, "prove it and I will pay you." This promise, though conditional, was held to take the demand out of the statute; for the defendant by such promise waived the benefit of the statute as much as by an express promise. Heyling v. Huskins. Salk. 29. *[152]

"But the promise must be a promise *to pay*."

For where in an action by an executor for money had and received to the use of testatrix, and *non assumpsit infra sex annos* pleaded: the evidence proved that the defendant said, "I acknowledge the receipt of the money, but the testatrix *gave it to me*." Mr. Baron *Clive* directed the jury to find for the defendant: for such an acknowledgment could not amount to a promise to pay, when the defendant insisted that he had a right to *retain* the money as a *gift*. Owen v. Wooley. at Salop. 1757. Bull. N. P. 148.

"In the case where several are bound jointly and severally "in a note or other undertaking, if a *joint* action is brought "against all, and they plead the statute of limitations, proof "*of a promise by one within six years* will support the action: "notwithstanding it was formerly held otherwise in the case "in the margin." Bland v. Haselrig. 2 Vent. 150.

For where, in *assumpsit* on a joint and several promissory note, and the action which was against one who pleaded the statute of limitations, payment of interest by another of the drawers, was held a sufficient acknowledgment to take it out of the statute as to all, and the plaintiff recovered accordingly. Whitcomb v. Whiting. Dougl. 629.

And in this case it was decided, That where a joint and several promissory note was given by two in the year 1784, and one became bankrupt, the *payee proved the note under his commission, and received several dividends, the last of which was in the year* 1793; a balance remaining unpaid, the present action was brought, and the defendant pleaded the statute of limitations. It was held, that the payment of the dividend under the commission against one took the debt out of the statute of limitations. Jackson v. Fairbank. 2 H. Bl. 342.

2. "But a *promise* is not necessary to take a demand out "of the statute; for the slightest *acknowledgment* of the debt "has been held sufficient, as to say, "Prove your debt, and "I will pay you," or "I am ready to account, but nothing is "due to you." Yea v. Fouraker. 2 Burr. 1099. Per Lord Mansfield. Cowp. 548.

So where to an action of *assumpsit* and the statute of limitations pleaded, the plaintiff proved, that just after the bill had Lawrence v. Worrall. Peake N. P. C. 93.

had been delivered, the defendant met the plaintiff, and said, "What an extravagant bill you have delivered to me." Lord *Kenyon* ruled this to be a sufficient acknowledgment of some money being due, so as to take it out of the statute.

"And what is an acknowledgment of the debt, is matter "to be left to the jury."

Loyd v. Maund. 2 T. Rep. 760.

For where the defendant, on the action being commenced, wrote a letter to the plaintiff's attorney in very ambiguous terms, neither expressly admitting nor denying the debt; the plea was the statute of limitations, and the plaintiff relied on the letter as an acknowledgment, the judge being of opinion, that it did not amount to an acknowledgment, nonsuited the plaintiff: but on a motion for a new trial it was held, That it should have been left to the jury whether it amounted to an acknowledgment or not.

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3. "The next mode by which the statute is prevented "from becoming a bar, is by *having sued out process* out of "some court before the six years elapsed, and having pro- "ceeded on it."

Hollister v. Clarkson, 1 Serra. 550. Metcalf v. Burrowes. Bull. N. P. 151. Brown v. Babington. 3 L. Ray. 880. Leadbeater v. Markland. 3 Bl. Rep. 1131.

1. A *latitat* sued out within six years shall be good to prevent the statute from running, though no bill of *Middlesex* preceding it is shewn. So a *capias* is good without an original.

Quære, Whether a *clausum fregit* will save it.

2. "So though the writ sued out has been *an informal one*, "it shall yet be sufficient." As where an attachment of privilege was sued out against an attorney, but was informal, from the circumstance of being made returnable on a general return: it was however held sufficient to prevent the demand from being barred by the statute: for the clause in the statute which permits the plaintiff to bring a new action within a year, where the first judgment has been reversed, allows for informality, since it takes notice of suits stayed for irregularity.

"But though irregular or informal process may thus pre- "vent the statute from attaching, yet process which is *im-* "*possible* or *a nullity* shall not take a demand out of the stat- "ute."

Green v. Rivett. 2 Salk. 421.

For where to a plea of *non assumpsit infra sex annos*, the plaintiff replied a bill of *Middlesex* tested *die Lunæ prox. post tres septimanas*, &c. and *returnable the same day*, whereupon was returned *non est inventus*, and shewed the continuances, and relied on this as process to prevent the statute's attaching on the demand; but on demurrer the defendant had judgment, for there cannot be such a bill of *Middlesex* as this is, returnable the very day of the teste; and the plea of the statute of limitations is to be favoured.

3. So

3. So if the plaintiff has levied a plaint in *assumpsit* in an inferior court, it shall prevent the statute of limitations from running against him, if he avers in his replication above, *that it is for the same cause of action.* Story v. Atkyns. 2 Stra. 719.

And if an action has been so commenced in an inferior court, and the defendant removes it by *habeas corpus* to the King's Bench; though the six years have elapsed before the removal, yet the statute does not bar the action, if the *commencement* of it in the court below was within the time. Gawer v. James. Trin. 14 G. 2. C. B. Buller. N. P. 151.

4. If the plaintiff *files his bill in Chancery*, and pending the suit there, the statute of limitations runs against his demand, and his bill is afterwards dismissed as a matter properly cognizable at law: in such case the court will interfere and save his right, by not suffering the statute to be pleaded in bar of it; though in this case it is said, that "a bill depending in chancery for six years is not sufficient to take a debt out of the statute of limitations; *ideo quære.* Anon. 1 Vern. 173. Anon. 2 Atk. 1. 1 Atk. 282.

But if a plaintiff has been delayed by the defendant himself, as by an injunction staying proceedings, till after the six years have run; in such case the plaintiff shall not be barred. *[154] Anon. 2 Chan. Cas. 217.

5. But it is necessary that a suit should be continued: for though a writ has been sued out, yet if there have been *no proceedings on it for six years* from the suing out the writ to the time of declaring, the statute shall run against the demand. Lacon v. Lacon. 2 Atk. 395.

Therefore wherever to *non assumpsit infra sex annos* the plaintiff replies a writ sued out within the six years, he must also shew *the continuances* in the suit; and a *taliter processum*, from that time to the declaration, is not sufficient. Budd v. Berkenhead. 2 Salk. 420.

"And the continuances must be by regular process."

For where to a plea of the statute of limitations the plaintiff replied, That he had sued out a bill of *Middlesex* in *Mich.* Term 1785, which had been regularly continued to *Mich.* 1789, when he *sued out an attachment of privilege* for the same cause of action to which the defendant appeared; to this there was a demurrer, when it was decided, That to keep the suit alive there must be a continuance of the original writ sued out; that here the first process was by bill of *Middlesex*, of *which an attachment of privilege (being a writ of a different nature) could not be a continuance;* and the defendant had judgment. Smith v. Bower. 3 T. Rep. 662.

So the continuances must be pleaded, *where the cause has been commenced by latitat or common clausum fregit;* but otherwise where it is by original. Therefore, where the plaintiff replied to the plea of the statute of limitations, an attachment of privilege sued out against the defendant (being an attorney) on a certain day within the six years, it was held, that the continuances need not be shewn; for Finch v. Wilson. 1 Wils. 167.

Whitehead v. Buckland. Style 373. 401.

an attachment of privilege in *C. B.* is in the nature of an *original writ*, in which no continuances are required to be shewn, but merely the teste.

Per Holt, 2 L. Raym. 881. Harris v. Woolford. 6 T. Rep. 617.

6. So in order to save the statute of limitations, it is not sufficient to shew the suing out of the writ within the time: it must also be shewn to have been *returned*.

7. "If a bill of *Middlesex or latitat* has been sued out in "the vacation, it by fiction of law always bears teste as "of the last day of the preceding term; it might therefore "happen, that though a demand was really barred in point "of time, yet by the reference to the last day of the preced-"ing term, the process might seem to precede the time when "the debt was in fact barred, and so take it out of the "statute."

Johnson & al. Assignees of Hargrave, v. Smith 2 Burr. 950. [155]

*It was therefore decided in this case, That where to a plea of the statute of limitations the plaintiff replied a *latitat* sued out and tested of the last day of the preceding *Michaelmas* term, at which time the demand was not barred; that the defendant should not be bound by this artificial reference to the last day of term, but might rejoin and give in evidence *the true time* when the process was sued out, so as to enable the statute to attach on the demand.

Lambert v. Whiteby Pasch. 1760. B. R. Bull. N. P. 151.

Wherever therefore the plaintiff endeavours to take advantage of this reference, the defendant should rejoin; and in his rejoinder shew the *true time when the writ was sued out*.

Osman v. Bowley. Hil. 12 G. 2. Per Eyre. Bull. N. P. 169.

If the defendant pleads *non assumpsit infra sex annos ante diem impetrationis brevis*, and the plaintiff reply *quod assumpsit infra sex annos, viz.* such a day, the plaintiff is not obliged to prove the taking out the original, because there is a particular day mentioned in the replication: but if no particular day be mentioned, the plaintiff must prove the taking out of the original.

Buller, ibid.

But there seems little foundation for that distinction; for though a particular day be named in the replication, yet the plaintiff is not bound to prove a promise on that day: and the manner of pleading to avoid the necessity of proving the original at the trial seems to be mistaken: for in such case the plaintiff should reply, that he sued forth the writ on such a day, and that the defendant promised within six years of that day, and conclude with an averment: and then the defendant is at liberty to take issue in his rejoinder, either on the time of the writ being sued out, or on the promise being made within six years of the time mentioned, they being alleged as distinct facts in the replication; and when the defendant takes issue on one of these facts, he admits the other to be true, and so it need not be proved.

And

And where to a plea of the statute of limitations the plaintiff replies a bill of *Middlesex* sued out on a day certain, and the defendant rejoins that he did not promise at any time within six years next before the suing out any precept called a bill of *Middlesex*, the plaintiff *cannot give parol evidence of the time of suing out the writ only*, but he must *produce the writ itself*, for the writ stated in the replication is not admitted, but the issue is joined, that the defendant did not sue out any writ. Burnell v. Braund. G. Hall. Sitt. Trin. 1772. MSS.

8. "By *sect.* 4. of stat. 21 *Jac.* 1. *c.* 6. if the judgment "has been arrested or reversed for error, or the defendant "has been outlawed, and the six years expire, the plaintiff "may bring a new action, provided he does it within one "year after such judgment has been arrested, *&c.* or the "outlawry has been reversed." [156]

9. So if there is an account current with *mutual items*, and any one of them be within the six years, that shall prevent the statute from attaching: but if all the items are beyond the six years, the statute in such case is a bar. Catling v. Skoulding. ante 149.

3. *How the Statute is to be pleaded.*

"Where the cause of action is to arise from an *executory* "*consideration*, as some act to be performed, and a promise "to pay in consequence of it, there *non assumpsit infra sex* "*annos* is not the proper plea; for the *assumpsit* does not "arise till the consideration is performed, which may be "long after the promise made: it should be *actio non ac-* "*crevit infra sex annos.*

As in *assumpsit* the plaintiff declared that, in consideration that he, at the request of the defendant, would admit *A.* and *B.* as guests to diet them, that the defendant promised to pay so much, and avers that he did so admit them: the defendant pleaded *non assumpsit infra sex annos*, and on demurrer it was held to be a bad plea: for it was not material when the promise was made, if the cause of action was within six years, from which time only the statute begins to run, and the dieting might be long after. Gould v. Johnson. 2 Salk. 422.

"This is the case of *assumpsit* generally; where the action "is *indebitatus assumpsit* it is different, as this last is for a "subsisting debt."

For where to such an action of *indebitatus assumpsit*, founded on a promise to pay on demand, the defendant pleaded *non assumpsit infra sex annos*, and the plaintiff demurred for cause, that the plea should be "that there was "no demand within six years," or "*non assumpsit* within six "years after demand; but the Court held the plea good: "for an *indebitatus assumpsit* shews a debt due at the time "of the promise made, and so the plea is good." But it Collins v. Bunning. Cas. K. B. 444.

had

Powell v. Pierce Mich. 4 G. 1. Bull N. P. 151.

had been otherwise, had the duty arisen from a collateral matter.

Hopkins v. Dewar. Hill. 32 G. 2. C. B. Bull. N. P. 152.

4. Another plea in this action is *bankruptcy in the plaintiff*; for if pleaded, it is a sufficient bar to the action for the defendant: or if proved at the trial that the plaintiff was a bankrupt at the time of the work or labour done, it will be sufficient to nonsuit him.

" But this is a good plea only where the action is for a " debt due to the bankrupt *before his bankruptcy*, for he may " maintain an action *for what he earns after his bankruptcy*."

Chippendale v. Thomlinson. Trin. 25 Geo. 2. B. R Cooke's B L. 459. *[157]

*For where to *assumpsit* for business done as an attorney, the defendant pleaded that the plaintiff was a bankrupt and the commission in full force, the plaintiff replied that *the business was done after the assignment, and for the necessary support of himself and his family*; to this was a rejoinder that the plaintiff had not obtained his certificate, and a demurrer. The Court were of opinion, that though the assignees might seize the bankrupt's future effects, yet that no other person could say that he had not a property in his own earnings, that the assignees could not contract for the bankrupt's labour, nor let him out, and therefore they over-ruled the demurrer.

Silk v Osborne. Evans v. Brown ante 122.

" But if the defendant pleads bankruptcy in the plaintiff, " he must also plead the commission and *assignment*."

Cary v. Crisp. Salk. 108.

For where he pleaded only that the plaintiff was a bankrupt, and so all his goods, &c. belonged to the commissioners, the plaintiff demurred and had judgment; *for till the assignment* the property of the goods is not taken out of the bankrupt.

2. " So that the *defendant was a bankrupt and had obtained* " *his certificate*, is a good plea to discharge all debts due " before his bankruptcy."

1. But it is a bar to such debts only *as could be proved under his commission*.

Paul v. Jones. 1 T. Rep. 599.

Therefore where the plaintiff had joined the defendant in giving a warrant of attorney to confess a judgment as a security for money payable at a future day *as a surety*, the defendant became a bankrupt before the plaintiff *had paid any money on account of the security*, though it had been demanded of him before the defendant's bankruptcy; it was adjudged, that though a party is liable for another by a contract prior to the bankruptcy, yet if he has not actually paid the money before the commission, he cannot prove it under the commission, and so he is not barred by the certificate.

Goddard v. Vanderheyden. 3 Wils 262. 2B. Rep. 764.

So where the case was, that the plaintiff having become bail for the defendant, a judgment was obtained against him on the bail bond in *Michaelmas* term 1763, on which he brought

brought a writ of error; in *March*, 1764, the defendant became a bankrupt: in *Trinity* term, 1764, the writ of error was non-prossed, and in *January*, 1765, he paid the money to the plaintiff in that action, and in *May*, 1765, the bankrupt obtained his certificate. To an action brought to recover the money so paid, the bankrupt pleaded his certificate, which was held to be no bar, for as the plaintiff had not paid the money till long after the bankruptcy, he could not swear that it was a debt due at the time of the bankruptcy, and so could not prove it under the commission, and therefore it was not barred by the certificate. [158]

"But where the debt could have been proved under the "commission, the certificate shall be a bar to the action."

Therefore where the plaintiff had joined the defendant as surety in a bond payable by installments, and *after default in the first installment*, the defendant became a bankrupt; it was held that as this could have been proved by stat. 7 *Geo.* 1. *c.* 31. under the bankrupt's commission, that it should be discharged by his certificate, which therefore was a bar to the action. Brooks v. Lloyd. 1 T. Rep. 17. Martin v. Court, 2 T. Rep. 640. S. P.

2. "But though by his certificate a bankrupt is discharged from all debts due at the time of the commission sued "out, yet *he may make himself liable for a debt due before "his bankruptcy, by a new promise before his certificate ob-"tained.*"

As in this case where the bankrupt was indebted in two notes to the plaintiff, who did not prove them under the commission, and on cancelling them the bankrupt gave him a note for little more than half their amount; this was held to be a good debt, and recoverable after the bankrupt had obtained his certificate. Trueman v. Fenton. Cowp. 544. ante.

But had the note been given as a consideration to induce the plaintiff to sign the defendant's certificate, it had been void under stat. 5 *Geo.* 2. or if it had been obtained by coercion, it had been in like manner void. Cockshot v. Bennet. 2 T. Rep. 765. ante 5.

"So if a new promise, after the bankrupt has obtained his "certificate, is set up to charge him, it must be an *absolute*, "not a *conditional* promise."

For where the promise was proved in the following manner, made by the bankrupt after he had obtained his certificate, "That the plaintiff should be no loser, but that he would pay him when he was able:" It was ruled by Lord *Loughborough*, at the trial that the promise was absolute, and the benefit of the certificate waived. But on a motion for a new trial it was held to be a conditional promise, and that the plaintiff should not recover on it, unless he proved that the defendant was able to pay at the time of the action brought. Per Heath and Gould, Just. dissent. Lord Loughborough. Besford v. Saunders. 2 H. Black. 116.

So where the plaintiff sued on a promise to pay, made by the bankrupt after his bankruptcy, on certain conditions: proof Colls v. Lovell. Espin. Cas. N. P. 282.

proof that he had petitioned the chancellor against the allowance of the bankrupt's certificate was ruled to be a good answer to the action, for it was attempting to defeat the object of the agreement.

Wickes v. Strahan. 2 Str. 1157.

4. A certificate under a joint commission shall discharge a separate debt; for separate debts may be proved under a joint commission by the Chancellor's order on petition.

5. "By stat. 5 *Geo.* 2. *c.* 30. The effects of a bankrupt "against whom a second commission has issued, are always "liable to his debts, except on the second commission he has "paid fifteen shillings in the pound; therefore in such case "the certificate is no bar."

Thornton v. Dallas. Doug. 46.

And though the *first commission had been superseded* by consent of the creditors, they having received a composition, yet in the case of a second bankruptcy, the bankrupt must pay fifteen shillings in the pound: for the statute has the words in it, "*compounded their debts.*"

Philpot v. Corden. 5 T. Rep. 287.

So if a person becomes a second time a bankrupt, if he does not pay fifteen shillings in the pound, and is sued by a creditor who has even signed his certificate under the second commission, the certificate is in such case no bar whatever: for the stat. 5. *Geo.* 2, makes the certificate only a protection to the bankrupt's person, but his effects still remain liable to his creditors.

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These are cases in which the bankruptcy has happened at the time of the action brought, and the certificate been obtained.

Graham v. Benton. 1 Wils. 41.

1. But where the cause of action was before the bankruptcy, and the action commenced during the bankruptcy, but *the certificate not obtained till after the judgment*, so that it could not be pleaded, the bankrupt shall be discharged by application to a judge.

Paris v. Salkeld. 2 Wils. 137. 139.

2. Where the party *becomes bankrupt after the action commenced* he may plead the bankruptcy *puis darrein continuance*, which must be received if verified by affidavit; but in such case it is not sufficient to say, "that on such a day he became a bankrupt;" but he should add, "that he had conformed to the statutes concerning bankrupts," or it is bad.

1 Wils. 41.

Note: When a bankrupt is sued, it is usual to apply by motion to the court to discharge him on common bail, which on a proper affidavit is done or refused, according to the circumstances of the case.

3. The next plea I shall consider is that of a *Tender*.

"Wherever the defendant admits the money to be due to "the plaintiff, it must be pleaded in the form of a tender."

French v. Watson. 2 Wils. 74.

For where to *assumpsit* for money had and received, &c. the defendant pleaded *non assumpsit* to the whole of the plaintiff's

tiff's demand, except ten guineas; and as to that said, *that he was ready and had always been ready to pay the same*; this on demurrer was adjudged to be a bad plea: for whether defendant was always ready to pay or not, is not issuable; it should have been pleaded as a tender.

1. Where the agreement is to pay at a certain time, "a tender at that time, and always ready," is a good plea; but where the money is due and payable immediately by the agreement, the party must plead *tout temps prist* from the time of the promise: and therefore in such case *this plea is bad after an imparlance*, for by that it appears that the defendant was not always ready. Giles v. Hart. Salk. 622.

But a tender may be pleaded after an imparlance *by leave of the court under particular circumstances*: as where the writ was returnable in *Easter* term, and the declaration not delivered till the day before the Essoin day of *Trinity* term, and the defendant lived in *Shropshire*, so that the agent could not get instructions in time. Bailey v. Holstone. Trin. 16 & 17 Geo. 2. Bull. N. P. 156. [160]

2. where the action is *indebitatus assumpsit*, if the defendant pleads a tender, it must be with a *tout temps prist* generally; for where it was that he was *tout temps prist after the tender*, it was held ill on demurrer: for it is not enough that he was always ready after the tender, for the money was due before, and the neglect of payment was a delay, a breach of contract, and a cause of action; and therefore the plaintiff should have judgment for the time which was unanswered. Sweatland v. Squire. 2 Salk. 623.

3. It was adjudged on demurrer, that a tender was pleadable to a *quantum meruit*. Johnson v. Lancaster. 1 Stra 576.

4. Where there is no certain time in the promise for payment of the money, the defendant is to be always ready, and when he pleads *semper paratus*, the plaintiff must in his replication shew a special request and refusal, if there be any, for the request laid in the declaration is not material nor traversable. Ferrand v. Pearson. Pasch. 2 Geo. 1. C. B. Bull. N. P. 156.

5. Where a time and place is fixed for payment, if the parties meet, he that pleads a tender must also plead a refusal, or such plea will be bad on demurrer, though good after a verdict; but if one be absent, the other must shew that he was at the time and place, and made the tender; in which case he must shew at what time of the day he was there, and how long he staid; for he ought to shew that he has done all that could be done to accomplish what by his agreement he was bound to do. 5 *Co.* 114. *Yelv.* 38. *Cro. Jac.* 13. Lancashire v. Killingworth. 2 Salk. 623.

And in such case, the last part of the day is the time by law appointed for a tender, unless the circumstances of the case point out another time, as payment on the transfer of stock, which must be from ten to twelve.

Clemens v. Reynolds. Sayer Rep. 18.

A tender, and that he has been always ready since the death of the intestate, is a bad *plea by the administrator*: it should be that his intestate was at all times ready during his life from the making of the promise ready to pay, and that he has been always ready since his intestate's death.

Under the head of a tender falls the case of *payment of money into court*.

Pether v. Shelton. 1 Stra. 638. [161]

1. For wherever the defendant pleads a tender, *he must always pay the money into court* he admits to be due; for without that it is no plea, and the plaintiff may sign judgment.

Hand v. Lady Dinely. 2 Stra. 1220.

2. If the defendant pays money into court but does not afterwards pay the plaintiff *his costs* up to that time, the plaintiff may go on with his action.

3 Black. Com. 304.

3. If after money paid into court, the plaintiff proceeds in his action, it is at his own peril: for if he does not prove more due than is so paid into court, he shall be nonsuited, and the defendant have his costs; for a tender and refusal discharges costs.

Anon. 1 Vent. 21.

As to what shall be a good Tender.—It is settled,

Wade's case. 5 Co. 114. 4 Res.

1. That if the defendant proves a tender in *bags* it is sufficient, for it is the receiver's business to tell it: but if the defendant says, "Here, I am ready to pay you." and yet holds the bags all the time under his arm, it is no good tender.

Black v. Smith. Peake. N. P. Cas. 88.

But where a party insists that more is due than the other offers to pay, in such case it is not necessary to produce the money; and where there are several who claim different demands on a joint amount (as sailors for their wages,) if the defendant makes an offer of a gross sum to all, which is refused, each insisting that more is due; such tender is good.

Cole v. Black. Peake N. P. Cas. 179.

A party tendering money cannot demand a receipt: and therefore an offer to pay, if the other party will give a receipt, is not a good tender. But if the party objected to the quantum, it waives an objection on account of a receipt being demanded.

S. C. 2 Res.

2. A tender in foreign money made current by proclamation is a good tender.

Anon. Espin. N. P. Cas 349.

3. A tender to a servant who carries the money into the house, and brings back word that his master will not receive it, is a good tender.

Dougall v. Bowman. 3 Wils. 145.

And *note*, That the defendant cannot plead *non assumpsit* to all the counts and a tender beside.

6. Another plea in this action is that of *Infancy*.

Darby v. Boucher. Salk. 279.

Though this may be also given in evidence of the general issue of *non assumpsit*, for the *promise of an infant is absolutely void*. "The

"The general rule in the case of infants is, that they are "liable on no contracts, *except for necessaries*, as meat, drink, "education, clothes," &c.

But if these contracts arise from fraud, infants are liable, as they are to all actions *ex delicto*, as here for money embezzled by the defendant from his master, to which he pleaded infancy, and ruled to be bad, and that he was liable. Bristow v. Eastman. Espin. Cas. N. P. 173.

1. But necessaries for an *infant's wife* are necessaries for himself, and he shall be liable; but if furnished *in order for the marriage*, he is not liable: for she was not *then* his wife, nor the goods furnished on his credit. Turner v. Frisby. 1 Stra. 168.

2. So if one under age contracts for the nursing of his child, it shall be deemed a lawful contract, and he shall be liable. Bac. Max. 18 Max.

3. "So whatever is for the *benefit of an infant's estate*, he "shall be liable to in this action."

*As where a copyhold estate descended to an infant and a reasonable fine was assessed, it was adjudged, that *indebitatus assumpsit* lay against the infant for that fine when he attained his full age, he having enjoyed it during the time of his infancy. And Justice *Yates* was of opinion, that it would lie during his infancy, though *debt* would not. 1 *Ld. Raymond*, 30. Evelyn v. Chichester. 3 Burr. 1717. *[162]

So if a *lease be made* to an infant, and he occupies and enjoys under such a lease, he is chargeable for the rent incurred during the time he continues in possession. Kirton v. Elliot. 2 Bulst. 69.

4. But though an infant is liable on his contract for necessaries, yet if one *lends money* to an infant, even to pay for necessaries, the infant is not liable; for it may be misapplied, and therefore the law will not trust him with the expenditure; but it is at the peril of the lender, who must lay it out for him, for then in fact it is providing him with necessaries: besides, the *assumpsit* is founded on the *lending*, not on the application. Earle v. Peele. Salk. 386.

So that if the plaintiff proved that the money was lent to pay for necessaries, and *applied to that purpose*, he might be entitled to a verdict: but in such case the defendant should rejoin and take issue on the expenditure. Ellis v. Ellis. Cas. K. B. 197.

"And therefore in such case, where infancy is pleaded, "'*that the goods were necessaries*,' is the only proper replica-"tion."

For where in *assumpsit* on a farrier's bill and infancy pleaded, the plaintiff replied, that it was for necessaries *for the infant's horses*: on demurrer the replication was held to be bad: for *non constat, that the horses were necessaries* for the infant. The replication should have been generally "that they Clowes v. Brook. 2 Stra. 1101.

they were necessaries," and then have left it to evidence, if the things furnished were not necessaries, from the circumstances of the defendant's health and fortune.

5. "Goods furnished to an infant *in the way of his trade* "are not necessaries, and therefore he is not liable; for the "law will not allow him to trade, which may ruin him."

Whittingham. v. Hill. Cro. Jac. 494.

In *assumpsit* for goods sold and delivered, the defendant pleaded infancy, replication that they were *pro necessariis victu & apparatu ad manutentionem familiæ suæ*. The defendant rejoined, that he was a mercer at *Shrewsbury*, and bought these wares to sell again, and traversed that they were *pro necessario, &c.* demurrer thereupon: and *per curiam*, this buying for the maintenance of his trade, though he gains thereby his living, shall not bind him, for an infant shall not be bound by his bargain for any thing but necessaries, as meat, drink, or learning.

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Whywall v. Champion. 2 Stra. 1083.

And this was so ruled by Chief Justice *Lee* in this case, which was an action for tobacco sent to the defendant, who was an infant, and kept a shop in the country; which the Court held would not lie against an infant, whom the law would not suffer to trade.

Bull. N. P. 154.

Though in another case before Mr. Baron *Clarke*, wherein the defendant gave nonage in evidence, it appeared that he had set up a farm, and bought the sheep from the plaintiff to stock it: the judge charged the jury to find for the plaintiff; and said, he thought the law should not put it into the power of infants so to impose on the rest of the world.

"And so much are the contracts of infants deemed void "for any thing but for necessaries."

Stone v. Withypoole. Cro. Eliz. 126.

That if an infant contracts debts for articles not necessaries, and dies, and his executor promises to pay, yet it shall not bind the estate: for the contract on which the promise was founded being void, the promise shall be deemed so too.

6. "But where an infant is *sub potestate parentis*, and living "in the house with his parents, he shall not then be liable "even for necessaries."

Bainbridge v. Pickering. 2 Bl. Rep. 1325.

Therefore where the action was for caps and other ornamental apparel; it being proved, that the defendant was an infant, and lived all the time with her mother; it was ruled by the Court, that under these circumstances the infant could not bind herself even for necessaries; for that what was fit and proper for infants under such circumstances was to be left to the direction of their parents, and allowing such contracts would be to encourage extravagance.

Simpson v. Robertson. Espin. N.P.Cas. 17.

And *per* Lord *Kenyon*, Where a tradesman colludes with a young man and gives him credit to an extravagant extent even for what might be deemed necessaries, as clothes *ex. gr.* though

though the father might be liable to a certain degree, yet in such case of extravagant credit the father shall not be liable.

And a tradesman is bound to inquire into the real circumstances of an infant whom he furnishes with clothes: for those things are only to be esteemed necessaries, in order to charge an infant, which correspond with his real, not with his apparent circumstances. Ford v. Fothergill. Espin. Cas. N. P. 211.

7. "But though an infant is thus exempt from all demands, except for necessaries, yet if goods, *not necessaries*, have been delivered to an infant, and, *after his coming of age, he promises to pay* for them, he thereby ratifies the contract, and shall be bound to pay. And what amounts to such confirmation shall be matter to be left to the jury." Southerton v. Whitlock. 1 Stra. 690.

"However, where an infant so binds himself by a new promise, he shall not be bound farther than the promise extends." [164]

For where under a plea of the general issue infancy was given in evidence by the defendant, the plaintiff's counsel then gave evidence of *a promise after he came of age, to pay half-a-crown in the pound*; it was ruled by Justice *Foster*, that this new promise should bind him to pay to the extent of it, but no farther. Green v. Parker. Abingdon Sum. Ass. 1756. MSS.

And where to a plea of infancy the plaintiff replies, that the defendant had ratified his promise after coming of age, and the defendant rejoins that he had not so ratified his promise after full age, upon which issue is joined. It is sufficient for the plaintiff to prove the promise; and the proof *that the defendant was not then of full age, lies upon the defendant*, though the assertion that he was of full age makes part of the plaintiff's replication; for whether of age or not, is a matter which lies within the defendant's own knowledge, and not within the plaintiff's. Borthwick v. Carruthers. 1 T. Rep. 648.

But where there was a plea of infancy, and at the trial the counsel for the defendant would have called his father to prove his nonage at the time of the contract: the Court refused to admit him, for he was named *guardian on the record, and so was liable to the costs of the action.* Jekyll v. Paterson. Sitt. Hil. 25 G. 3. MSS.

"But where the plaintiff relies on a new promise made after full age, the infant must always be charged on *the simple contract*," which the new promise was meant to establish.

For where an infant bought *a chariot and horses*, and gave a *single bond* for the money, and after, at full age, promised to pay, this matter being specially found, the Court was of opinion that the contract was so extinguished by the bond, that it did not remain to be a consideration for his promise at full age, and so they gave judgment for the defendant. Capper v. Davenant. Trin. 29 Car. 2. B. R. Bull. N. P. 155.

But

Ayliff v. Archdall. Cro. Eliz. 290.

But if the things furnished *were necessaries*, an infant may bind himself by *bond*, but it must be in a bond to the exact amount and value of the necessaries furnished; for where it was *with a penalty*, it was adjudged to be void, but that a single bond had been good.

Russell v. Lee. 1 Lev. 87.

And so where an infant gave a single bill for payment of necessaries, it was held good against the infant.

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8. "But though an undertaking or promise is made to "an infant, *in consideration of such infant's promise*, though "this is void; yet, if the promise is for the *infant's benefit*, "he may maintain an action on it."

Holt v. Wood. 2 Stra. 973.

As in this case, which was that of mutual promises to marry, and one of the parties was an infant, the infant recovered damages for breach of the promise of marriage.

Lewis v. Willis. 1 Wils. 314.

7. In *assumpsit* under the statute for *use and occupation* of an house, by permission of the plaintiff; *nil habuit in tenementis* is a bad plea. For the action is founded on the promises, and therefore if the plaintiff had an equitable title, or no title at all, yet if the defendant enjoyed by permission of the plaintiff, it is sufficient. For it is not necessary for the plaintiff to say, that it was his house, any more than in *assumpsit* for goods it is necessary to say that they were his goods. But the plea would be good at common law, for there an *interest is supposed to pass* from the lessor.

8. "*A judgment* for a defendant *in one personal action, is a* "*good bar to another personal action for the same cause*, and is "therefore a good plea. (6 Co. 7.) But the cause of action "must be specially stated to be the same."

Kitchen v. Campbell. 2 Bl. Rep. 779. 3 Wils. 240. S. C.

As where the defendant being a creditor to a bankrupt, had signed judgment on a bond of the bankrupt's on the 9th of *March*, and sued out a writ of *fi. fa.* thereon, under which the sheriff levied the money: on the 9th of *April* the commission was sued out, and in *Michaelmas* term following the assignees brought trover for the goods so taken under the execution, and had a verdict against them. They afterwards brought *assumpsit* for the money arising from the sale of the same goods: the defendant having pleaded the former recovery in trover, it was held to be ill, *for want of the proper averments* to support the plea, *viz.* that *the question or cause of action was the same.* Afterwards the parties going to trial on other issues, the special matter was found, though farther, that the bankrupt had committed an act of bankruptcy before the 9th of *March*, *viz.* in the *February* preceding: but the Court held clearly that the assignees having failed in the action of trover, could not recover in *assumpsit* for the price of the same goods. And the test when one action shall be a bar to another is, *when the same evidence is required* in both actions, as was the case in this.

2 Bl. Rep. 827. 3 Wils. 304.

9. "That

9. "That the *money* for which the action is brought *has* "*been attended in* the defendant's hands, *by foreign attach-* "*ment*, is a good plea: so it may be given in evidence on "the general issue." Vid. Plen. Action of Debt. ch. 2. Willes v. Needham. 1 Lord Raym. 180. [166]

But if the defendant pleads such foreign attachment at the suit of *J. S.* or gives it in evidence, he should prove *that the plaintiff was indebted to J. S.*, for otherwise it might be a collusion between *J. S.* and the defendant to defraud the plaintiff. But the plaintiff is at liberty to shew that the suit in *London* for the attachment was commenced after an original filed by the plaintiff against the defendant, for that would avoid the operation of the foreign attachment, the suit being actually commenced in the courts above, when the attachment took place. Palmer v. Hooke. 1 Lord Raym. 727.

As where in *assumpsit* on a note of hand given by the defendant to the plaintiff, and *non assumpsit* pleaded, the plaintiff proved the note in evidence: the defendant in discharge of himself produced the record of a foreign attachment, whereby the said debt was attached by city process for satisfaction of a debt demanded there of the plaintiff, and was there condemned: it was ruled by *Trevor*, Ch. Just. that this was a good discharge; but that if the plaintiff could have shewn the original wherein he declared to have preceded the attachment, so that it would have appeared that *this court was in possession of the action to recover the debt before it was attached*, that in that case the plaintiff should recover, notwithstanding the attachment. Savage's case. Salk. 291.

And in this case as to how it may be pleaded, and how given in evidence on the general issue, it was ruled that if the *attachment and condemnation be before the writ purchased*, it may be given in evidence on the general issue, because there is an alteration of the property before the action brought; but if the *attachment only* be before the writ purchased, *but not the condemnation*, it ought to be pleaded in abatement of the writ; but if the *condemnation be after the action commenced, and before the plea pleaded*, it may then be pleaded in bar, but shall not be given in evidence on the general issue, for that the property is not altered until condemnation. Brook v. Smith. Salk. 280.

10. "*Alienage* in the plaintiff is a good plea in abate- "ment, but it must be, that he is an *alien enemy*; for alien "friends may maintain personal actions, and it shall not be "presumed that he was an enemy." Openheimer v. Levy. 2 Stra. 1082.

11. "*A discharge under the insolvent debtor's act* is a good "plea."

*But in such case the defendant should shew that he was a person within the benefit of the act, and that the discharge was in every respect regular and pursuant to the statute. Turner v. Beale. Salk. 521. *[167]

12. "*A*

12. "*A release* is also a good plea in this action."

May v. King. Case K. B. 538.

And a promise before it is broken may be released by parol, but after it has been broken it cannot be discharged without deed, by any new agreement, without satisfaction. "For till there is a duty or demand, there is nothing where-"on the release can operate."

Drage v. Netter. 1 Ld. Raym. 65.

Therefore, where to an action on a bill of exchange, against the drawer, he pleaded a release after the bill drawn, but before the acceptance; it was adjudged bad.—For the release was before the defendant was chargeable, the acceptor being first liable.

Hilliard v. Cox. Salk. 37.

13. Where an action is brought by an administrator, it is a good plea "*that the intestate was resident within a dif-"ferent diocese when he died;*" for simple contract debts are personal, and the administration must be committed of them where the party dies. And if a man has two houses in different dioceses, and lives mostly at one, but goes occasionally to the other, where he happens to die, administration shall be granted by the bishop of the diocese where he died; for he was commorant there, and not merely as a traveller.

Ravee v. Farmer. 4 T. Rep. 146.

14. It would be a good plea for the defendant that all matters in difference between him and the plaintiff had been referred to arbitration, and an award made thereon; but where the defendant does so plead, and the words of the reference are *of all matters in dispute*; yet the plaintiff is not precluded thereby, but may give in evidence that the subject matter of the present action was not before the arbitrators, nor decided on by them.

Kearslake v. Morgan. 5 T. Rep. 513.

15. So "that the defendant indorsed over to the plaintiff a "promissory note for and on account of the debt, and that the "plaintiff then and there accepted it for and on account of "the debt," is a good plea. For the plaintiff might have indorsed it over to a third person, by whom the defendant might afterwards be sued without the means of defence, or the plaintiff might by laches have made it his own: but in such case the plaintiff may reply, that the note was bad or unpaid.

Marshall v. Gibbs. 2 Stra. 1022. Elrington v. Dosham. 1 Lev. 142. Per Lord Mansfield. 3 Burr. 1010.

16. The last plea I shall consider is, that of the *general issue*, which is *non assumpsit*. Though where the defendant pleaded *not guilty*, it was held to be good after a verdict, though if the plaintiff had demurred, it had been bad.

1. Under this issue the defendant may go into equitable defence: he may prove a release without pleading it, and take advantage of every equitable allowance possible.

Dale v. Sollet. 4 Burr. 2133.

So in *assumpsit* for money had and received, the defendant may, under the general issue pleaded, give in evidence a *retainer* of so much money in his hands due to him by the plaintiff, without pleading or giving notice of it as a set-off; for the plaintiff can only recover what in equity and conscience

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science is due, which is what remains due after all fair deductions.

2. So he can give *payment* in evidence on the general issue, or he may plead it. For as there is no debt, there shall be presumed to be no promise. Hatton v. Morse. Salk. 394.

And in an action against the maker of a promissory note, the indorser is a good witness to prove it paid. Charrington v. Milner. Peak. N. P. Cas. 6.

3. So under the general issue he can give an usurious contract in evidence: for the statute having declared all such *contracts as absolutely void*, there can be no *assumpsit*. Lord Bernard v. Saul. 1 Stra. 198.

4. So infancy may be given in evidence on the general issue. 2 *Lev.* 144. Ante. 161.

5. In an action on a promissory note against three persons, two of whom were stated to be outlawed, and the last pleaded *non assumpsit*, the declaration misnamed one of the parties, whose name was on the note; it was adjudged, that at the trial, the defendant who had pleaded might avail himself of this variance, between the instrument declared on and that offered in evidence. Gordon v. Austin. 4 T. Rep. 611.

6. And in general whatever defeats the promise is good evidence on *non assumpsit*: as where a seaman had sued in the admiralty court for his wages, and had judgment against him there, and afterwards brought assumpsit at law: the first sentence was held to be conclusive evidence against him. 2 Stra. 733.

17. As the defendant may plead double under the statute, it must be observed that he cannot plead *inconsistent pleas*, as *non assumpsit* to the whole declaration, and a *tender* to a part: for if the *non assumpsit* be found for him, it is that nothing is due, whereas the *tender* admits something to be due. M'Lellan v. Howard. 4 T. Rep. 196.

4thly, OF THE VERDICT, THE JUDGMENT, AND WRIT OF INQUIRY.

1. OF THE VERDICT.

1. Where there are two or more defendants, and one suffers judgment to go by default, and the others go on to trial; the plaintiff cannot be nonsuited as to these, though he cannot prove his case, but the defendant must have a verdict. Hamay v. Smith & al. 3 T. Rep. 662. [169]

2. "The verdict should follow the issue. For if the "plaintiff declares that the defendant assumed to do divers "things, and the jury find that he assumed to do only a part, the plaintiff hath failed in his case."

As where the plaintiff declared, that in consideration of, &c. the defendant undertook and assumed to give him 13*l.* a field Simms v. Westcott. Cro. Eliz. 147.

field of hemp, and other matters; and the jury find that the defendant only promised to give him 13*l.* The defendant had judgment.

Mustard v. Hopper. Cro. Eliz. 149.

So if the plaintiff declares on an absolute promise, and the jury find a conditional one, the plaintiff shall not have judgment: for the promise in the first case is entire, and if the plaintiff fails in proving part he fails in the whole. And in the latter case, the promise found is not that on which the plaintiff grounded his action.

3 Burr. 906.

"But where the ground of the action is not upon an entire "contract, but merely in damages, there the finding of the "jury may vary. For it is a rule in this action that the "plaintiff may recover less than he goes for, but not more."

Gardiner v. Crosdale. 2 Burr. 904. 2 Bl. Rep. 198. S. C. Per Ld. Kenyon. Young v. Milner. West. Sitt. Hill. 31 Geo. 3.

Therefore in an action on a policy of insurance, where the plaintiff declared for a total loss, he was allowed to recover for a partial one only.

So in an action on a promissory note given for different considerations, the defendant may go into evidence of part of the considerations not being performed, and so that part of the note is not due, or that part has been paid, and the plaintiff may *recover the remainder*.

Boldero v. Andrews. 26 Car. 2. Per Hales. Mull. N. P. 155.

So the jury may give less damages than are proved. As on a promise to pay for an horse a farthing a nail, doubling each time, which would amount to an immense sum.

2. OF THE JUDGMENT AND WRIT OF INQUIRY.

When the jury find a verdict they then settle the quantum of the damages. But where there is judgment by default, or on demurrer, or any other interlocutory judgment, then the plaintiff's right to some damages is determined; but the express sum is to be settled in damages by the intervention of a jury on a writ of inquiry, which goes to the sheriff, who returns them when found, to the Court, upon which the plaintiff obtains final judgment.

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As to which these points have been settled.

East India company v. Glover. 1 Stra. 612.

1. In an action on an agreement for goods at a sale, and judgment by default, the defendant shall not in a writ of inquiry be allowed *to go into evidence of fraud on the sale*; for by suffering judgment to go by default, he admits the agreement as set out by the plaintiff, and the writ of inquiry is only to settle the quantum of the damages.

Snowden v. Thomas. 2 Bl. Rep. 748. 3 Wils. 155. S. C. & contra.

2. If the action has been on a promissory note, the note in executing the writ of inquiry ought to be proved. Though circumstances may vary this rule, as here where the defendant's attorney offered to admit the whole, if execution was stayed.

But

But in proving the note, it is not necessary to be done by the subscribing witness, but it may be done by proving the party's hand. For the note being set out in the declaration, is admitted, and the only use of producing it, is to see whether any money is indorsed on it as received. Bevis v. Lindsell. 2 Stra. 1149.

It was however in this case resolved, that where a judgment by default was on a bill of exchange, it was sufficient to produce it without proving it, for that the amount was admitted, and the only reason for producing it was to see if any part had been paid. Green v. Hearne. 3 T. Rep. 303.

But in cases of promissory notes and bills of exchange in which the defendant lets judgment go by default, the present practice is to refer them to the master to ascertain the amount of the note or bill and interest, without the intervention of a writ of inquiry. And this in both courts of K. B. and C. B. Andrews v. Blake H. Bl. 529—541. Shepherd v. Charter. 4 T. Rep. 275.

If an indorsed bill of exchange is not paid when due, the indorsee in an action against the indorser is, after a protest, not barely intitled to legal interest, but shall also have all the incident expenses, as exchange, &c. if such charges are reasonable. Auriol v. Thomas. 2 T. Rep. 52.

3. If on a judgment by default and writ of inquiry, the plaintiff proves an account stated, and a balance then due to the plaintiff, the jury should *give interest* for the sum so settled, *from the time of its being so liquidated to the bringing of the action.* And *per Cur.* in this case, where a note is due, it bears interest from that time; where money is lent, it bears interest from the time it becomes payable; but for money due for goods sold, no interest is allowed. Blaney v. Hendrick. 3 Wils. 205.

There must be the same notice of executing a *scire fieri* inquiry as a common writ of inquiry. Stead v. Lateward. 1 Stra. 622.

*And the notice should accurately describe the place where it is to be executed, for in this case the notice having omitted to describe the sign of the house where it was to be executed, and also that it was to be executed between two certain hours, it was for that reason set aside. Arnold v Squire. Sayer Rep. 181. *[171]

5. In this case the plaintiff, after obtaining an interlocutory judgment and the issuing of the writ of inquiry, became a bankrupt; but before the writ was executed; notwithstanding which it was executed in his name; it was moved to set this aside, on the ground that by the bankruptcy the property vested in the assignees, who should have sued out a *scire facias*, and the writ of inquiry have been executed in their names: but the Court held it to be good. Bibbins v. Mantel. 2 Wils. 358.

Bayliss v. Lucas. Cowp. 112.

6. Judgment on a writ of inquiry was set aside; it appearing that the under-sheriff who had returned the jury, was attorney for the plaintiff in the action.

Nedham v. Corsellis. Cro. Eliz. 293.

7. Where the defendant is a foreigner, it is not necessary that the jury, on a writ of inquiry, should be that *fier medietatem linguæ*.

Stainton v. Beadle. 4 T. Rep. 472.

8. Where part of the jury, on a writ of enquiry, was composed of persons then in prison for debt, it was held a sufficient reason to set aside the execution of a writ of inquiry.

Bartlet v. Robins. 2 Wils. 258.

And note as to costs—That where the defendant pleads a tender, which is found against him under statute 43 *Eliz.* 6. If the damages are under forty shillings, the judge may certify and deprive the plaintiff of his costs.

Shadford v. Houston. 1 Str. 317.

And in this case the Court ordered costs for not going on to execute a writ of inquiry, as they do for not going on to trial.

CHAPTER

CHAPTER II.

The Action of Debt.

DEBT is an action founded upon an *express contract*, in which the certainty of the sum or duty appears, and in which the plaintiff is to recover the sum he goes for *in numero*, and not in damages.

This action I shall consider, 1st, With reference to the contract. 2dly, with reference to the person. 3dly, The pleadings. 4thly, The evidence. 5thly, The verdict and judgment.

1. DEBT CONSIDERED WITH REFERENCE TO THE CONTRACT.

1st, This is on simple contracts.

2d, On special contracts under seal, as bond and leases.

3d, On matters of record, as judgments, statutes, and recognizances.

1. OF DEBT ON SIMPLE CONTRACTS.

Debt lies upon all simple contracts, wherein there is a commutation of property for money. As for the price of goods sold, wherein the price has been ascertained between the parties: but for such causes this action is now seldom brought: first, Because the wager of law is allowed: 2dly, Because it was held, That the plaintiff must recover the *exact* sum declared for, or he could not have judgment, which being often uncertain, it has given way to the action of *assumpsit*. Slade's case. 4 Co. 94.

But as this action may still be brought for simple contracts, it may not be improper to take notice of some cases in which *debt will not lie*.

And 1. *Debt on simple contract* will not lie against an *executor or administrator*; the proper remedy is an action on the case. For the testator might have waged his law, which the executor or administrator cannnot do. Pinchon's case. 9 Co. 87. Morgan v. Green. Cro. Car. 187.

*[173]

2. If a man retains an *attorney* to conduct a suit for him, the attorney may have debt for his fees: but if one promises an attorney to pay him, if he acts for another person, debt will not lie; for there was no *quid pro quo* whereon to found Sands v. Trevilian. Cro. Car. 107—193. Per Lord Holt. 2 L. Raym. 483.

found a contract: the action should be on the promises: and besides that, the attorney has a remedy against the party for whom he acted.

Hard's case. Salk. 23.

3. Debt will not lie against the *acceptor of a bill of exchange*, for notwithstanding the acceptance, the drawer still is liable; so that it is not the actual debt of the acceptor, but he is rather in the nature of a security: but it lies against the *drawer* himself, for he was really a debtor by the receipt of the money.

1. OF DEBT ON SPECIAL CONTRACTS.

These are, 1st, On Bonds. 2dly, For Rent.

1. OF DEBT ON BONDS.

I shall first consider what bonds are good in law; and secondly, what are void.

"Bonds good in law are such as are entered into by parties able to contract voluntarily, and for a consideration, "which is according to law."

1st, A Bond must be by Parties able to contract.

Litt. s. 259.

1. Therefore bonds made by *infants*, under 21 years are void.

And such is likewise the case of *femes covert*.

Co. Lit. 176.

But there is an exception, that infants may bind themselves to pay for meat, drink, apparel, or other necessaries, and it will be good in law.

Ayliffe v. Archdall. Cro. Eliz. 926.

But it must be in an obligation for the *very sum* necessary for the purposes: for an obligation, *with a penalty*, conditioning to pay for necessaries, is void.

Beverley's case. 4 Co. 123. 1 Res.

2. So every deed which any man *non compos* makes, is avoidable.

Yates v. Boen. 2 Stra. 1104.

*[174]

*But modern resolutions seem to consider it as absolutely void; for the defendant to debt on a bond may plead *non est factum*, and give lunacy in evidence.

In all these cases of infants, feme-coverts, or persons insane from the weakness, want, or imbecility of judgment, or want of power, their contracts are deemed void in law.

2dly, Bonds must be entered into voluntarily.

Wheipdale's case. 5 Co. 119. 2 Res.

1. It is essential to a bond that it is entered into *voluntarily*, for if *obtained by duress* the bond is voidable by the obligor: but as the bond on the face of it appears to be good, the obligor

obligor must avoid the bond by *pleading* to it *duress*; for the Court must decide by the verdict of a jury, if it was obtained by duress or not.

" And these cases have been deemed duress sufficient to " avoid a bond."

If given by the defendant when *under an arrest* made *without any cause of action*; or if the arrest was for a just debt, but made *without good authority*; or if the arrest was made by a *warrant* from a justice of peace on *a charge of felony, when no felony was in fact committed*; or if a felony was committed, yet if *the arrest was unlawfully made*, it is duress: and bonds entered into by persons in custody under those circumstances, are avoidable in law. Wooden v. Collins. Mic. 9 G. 2. Bull. N. P. 172.

" And it is the same in a court of equity,"

For though a man is arrested by due course of law, yet if a wrong use be made of it, as compelling him to execute deeds not before thought of, a court of equity will consider it as duress and relieve him. Nicholls v. Nicholls. Atk. 409.

But duress *of goods* will not be sufficient to avoid a bond: though held otherwise in 1 *Roll. ab.* 687. Sumner v. Fenymans. 2 Stra. 917.

" So duress shall only avoid the bond *as to the obligor* him- " self."

Therefore it was held no discharge *to the surety*, who had joined in the bond, and against whom there had been no duress practised. Huscomb v. Standing. Cro. Jac. 197.

2. If a man menace me except I make him a bond for 40*l.* and I tell him I will not do it, but will give a bond for 80*l.* the court will not expound this bond to be a voluntary one; for *non videtur consensum retenuisse, qui ex præscripto minantis aliquid mutavit.* Bac. Reg. 22. [175]

3dly, Bonds must be for a Consideration which is according to Law,

That involves the consideration of, What bonds are void? For such are void whose consideration is not legal.

These are, 1st, such as are void in their creation; or 2d, such as are void by matter subsequent. Co. Lit. 206 b.

Bonds void in law at their creation are such whose consideration is, *malum prohibitum*, or founded on express prohibitory statutes; as simony, usury, *&c.* 2dly, Whose consideration is *malum in se.* 3dly, Which are contrary to the good policy of the state, as in restraint of trade, *ex. gr.* and are founded on the common law.

1. " Bonds

1. "Bonds whose consideration is *malum prohibitum*," are, 1st, Bonds whose consideration is an usurious contract or agreement. 2dly, Bonds given for money won at play. 3dly, Bonds given for the sale of offices. 4thly, Bonds given for a simoniccal consideration.

1. Of Bonds whose Consideration is usurious.

1. By statute 12 *Ann.* c. 16. *s.* 1. it is enacted, "That no "person shall upon any contract take for the loan of any "monies, wares, &c. above the value of 5*l.* for the forbear- "ance of 100*l.* for one year. And all bonds and assurances "for payment of money, whereon shall be reserved or taken "interest above 5*l. per cent.* shall be void.

Pollard v. Scoly. Cro. Eliz. 20.

But where the first bond or security is entered into *bona fide*, and the interest legally reserved, a subsequent agreement reserving more than legal interest *on the first contract* shall not avoid *it*; though the last agreement is void under the statute.

Gray v. Fowler. Ass. of Purser. H. Blackst. 462.

So where on an issue out of chancery, the case was, the plaintiff was a malt factor, and had supplied the bankrupt with malt at different times, for which he usually drew at three months, and on the 28th of *Jan.* 1787, the bankrupt was indebted to the plaintiff 1125*l.*: the plaintiff then demanded payment; and on the bankrupt's asking for time, he insisted *that* 150*l. should be added to the debt*, as he would have nothing to do with interest; these made together 1257*l.* and for the aggregate sum the bankrupt *gave him five acceptances payable within fourteen months.* After this transaction the plaintiff gave him further credit to the amount of 597*l.* The two first acceptances were paid, amounting to 440*l.* In the month of *October*, 1787, all dealings between them ceased, and the plaintiff then insisting on a better security for the whole which was due to him, he agreed to take an assignment of some leasehold premises, and in that deed the sum then due as the balance was secured, and interest at 5*l. per cent.* Two questions arose on this: 1st, Whether the reserving the sum of 150*l.* did not vitiate the debt then due? 2dly, Whether the debt for goods sold, was not extinguished by taking a deed to secure it? But it was resolved, that the debts for the goods still subsisted unimpeached by the subsequent usurious transaction, and unextinguished by taking the security by the deed, though it was agreed that the notes were void.

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Winch v. Fenn. Sitt. Hill. 1786. B. R. MSS.

But where in an action for usury, and it was proved to be the custom to discount bills in *London* for persons in the country and that on such discount they had charged the usual discount of interest of 5*l. per cent.* and five shillings *per cent.* on the gross sum, as commission to answer the extra expenses of clerks, &c. kept for this business: this was adjudged not to be usury.

2. "Several

2. "Several evasions have been attempted of this statute, "but the courts have uniformly supported its spirit: for "however disguised the agreement might be, if in fact it "was usurious, it has been held to be void." 5 Co. 69. b.

As 1. Where the lender of money compelled the borrower *to take goods* at a price considerably above their value in *the form of a sale*; and afterwards had them re-purchased at a lower price, whereby he reserved to himself a greater profit than 5*l. per cent.*; it was adjudged to be usurious. Lowe v. Waller. Dougl. 708.

But where in discounting a bill a person gives goods in part, which are charged at rather an high price, it shall not be deemed usury, provided the price is not so exorbitant that it appears to be for the purpose of reserving exorbitant interest under colour of it. Rich v. Topping. Espin. Cas. N. P. 176.

So where the defendant sold to the plaintiff goods of the value of 20*l.* and it was agreed that the plaintiff should pay for them within six months 34*l.*, this was held to be usurious. Paterson's case. Cro. Eliz. 104.

But however, where the plaintiff sold goods, *viz.* gold, to the defendant, to be paid for in three months; but if not then paid, that the defendant should pay one halfpenny per ounce for every month after; though this exceeded 5*l. per cent.* yet it being proved to be the *usage of the trade*, it was on that ground held to be not usurious, though if it had not been a *bona fide* sale, but merely colourable to cover a loan, it had been otherwise. Floyer v. Edwards. Cowp. 112. [177]

So where a person having occasion for a loan of money, applied to another to lend it to him, who answered, that all his money was in the stocks, and that if he was to sell out at that time, he would lose by it; but that if he would take stock at 75 (the current price at that time being 73), he would lend the money; to which the party consented: this was held to be clearly usurious. Doe v. Barnard. Espin. Cas. N. P. 11.

So where a country banker discounting a bill took interest for the whole time it had to run, and, instead of paying money for the bill, gave notes payable in *London* three days after sight: it was held to be usurious. Maugham quot. v. Griffiths. Peake. Cas. N. P. 200.

So where illegal interest was reserved in the form of rent for an house, it was held to be usury. Bedo v. Saunderson. Cro. Jac. 440.

2. "If by any possibility above legal interest *can be received* "in money, and that appears on the face of the contract, "it shall be deemed usury: for uncertainty of receiving "does not prevent it from being so deemed an usurious "contract."

As where the bond reserved 10*l.* for the forbearance of 20*l.* for one year, *if the son of A. was then alive*, though the life of the son of *A.* was uncertain, and so the interest might wholly Button v. Downham. Cro. Eliz. 642.

Clayton's case. 5 Co. 70.

wholly be lost, yet as, by his living, above legal interest was to be paid, it was held to be usury: And for a further reason, that if the uncertainty of life might be allowed as an evasion, the interest might be reserved on the contingency of *many lives*, which would amount to a certainty.

"But a reservation whereby the lender of the money "may eventually obtain more in value than 5*l. per cent.* "but may also receive less, so that on the face of the instru- "ment it does not appear that he is to obtain in money, a "*certain advantage above* 5*l. per cent.* shall not be deemed "usury."

Morisset v. King. 2 Burr. 891.

Therefore where in debt on a bond, the case was, that the plaintiff lent to the defendant 100*l.* (for which the bond was given) for four years *without interest*, but in consideration of which, the defendant agreed to find the plaintiff's daughter with meat and drink for that time, and also to take her into partnership with his wife, she paying a moiety of the charges, losses, &c. of the business, and receiving half the profits; and further, that the defendant was to board and lodge the plaintiff herself for 20*l. per ann.* The defendant pleaded that the consideration of the bond was usurious, for that the board and lodging of the plaintiff was worth more than 20*l.*, and that that of the daughter was worth 10*l.*: the Court were clearly of opinion that this was not usury, for the defendant might receive so much from the skill, recommendation, and connections of the daughter as might be worth the consideration; and she might receive a loss which would overbalance the consideration, as she might be made a bankrupt in consequence of this trading.

Sayer v. Glean. 1 Lev. 5. 1 Sid. 27. S. C.

3. "For the rule is general, that where the principal is "safe, and the interest only hazarded, if that is more than "legal, the contract is usurious."

Sharpley v. Hurrell. Cro. Jac. 208. 1 Sid. 27. *[178]

*"Therefore no contract shall be deemed usurious in "which the lender *runs the risque of losing his principal*, how- "ever large the interest reserved may be." As in the case of lending on *bottomry or at respondentia*, in which cases though the interest reserved far exceeds what is legal, yet is the contract good.

L.d. Chesterfield & al executors of John Spencer v. Sir Abraham Jansen. 1 Wils. 286. 1 Atk. 304. S. C.

As where Mr. *Spencer* borrowed 5000*l.* of the defendant, for which he gave his bond for 10,000*l.*, payable on the contingency of his surviving the Dutchess of *Marlborough*; though there was a great disparity of age, he being but thirty years of age and she seventy, so that the contingency of his dying first appeared so slender; yet it being proved that he was of a very bad constitution, it was, on a solemn hearing, adjudged a fair contingency; and though the sum reserved far exceeded legal interest, yet as the defendant ran the risque of losing both principal and interest, the agreement was adjudged not to be usurious.

"But

"But where the contingency upon which the defendant "is to lose the money is so very slight, that it appears to be "merely an evasion;" as if it was on the contingency of a young and healthy person dying within three months, this shall be deemed usurious. Richards v. Brown. Cowp. 770. 2 Res.

"Upon this ground it is that the grant of *an annuity* at "ever so great an under-price is not usury: because the "principal is absolutely sunk and gone to the lender." Per Just. Burnet. 1 Atk. 330.

And though there be a certain value for such things, and the sum given much below it, it is not usury unless there is some secret contract to repay the principal. Tanfield v. Finch. Cro. Eliz. 27.

So that in cases of loans in this form, the question turns upon, Whether there was a fair *purchase of an annuity*, or a real loan of money under the colour of an annuity? For if the substance of the agreement was for a *loan*, a slight colourable contingency shall not take the agreement out of the statute of usury, where above legal interest has been reserved. Richards v. Brown. Cowp. 770.

But where the grant was in the form of an annuity, and there was a clause in the deed *that the borrower might repay the sum given for the annuity* at a future period, which would seem to make the sum advanced a loan and the annuity interest: yet the court held it not to be usury; for the repayment was casual and depended on the borrower (the grantor) himself, so that it was not in the lender's power to have his money at all events, so that as to him the principal was gone. Murray v. Harding. 3 Wils. 390.

2. Of Bonds given for money won at play. [179]

By stat. 9 *Ann. c.* 14. it is enacted, "That all notes, "bills, bonds, judgments, mortgages, or other securities "given by any person where the whole or any part of the "consideration of such securities shall be for money or other "valuable things won by gaming, or by betting on such as "game, or for repaying any money knowingly lent for such "gaming, or lent at the time and place of such play to any "person who shall play or bet, shall be void. And where "such securities shall affect lands, they shall enure to the "uses of such persons as would be entitled to the lands in "case the person incumbering the same had been dead and "the security void."

3. Of Bonds given for Sale of Offices.

As to these it is enacted, by stat. 5 & 6 *Ed.* 6. *c.* 16. "That if any person bargain or sell any office or deputation, "or any part of them, or receive money or profit, or take "any promise or assurance for the same, which office shall "in any wise touch or concern the administration or execu- "tion of justice, or the receipt, controlment, or payment of "any of the king's treasure, rent, revenue, auditorships, or

" surveying manors or lands, or the king's customs, or any " administration or necessary attendance in the custom-hou- " ses, or the keeping of any of the king's fortresses, or " which shall concern any clerkship in any court of record " wherein justice is to be administered, all such bargains, " agreements, bonds, and assurances shall be void : but the " act not to extend to any office whereof any person is seized " of any estate of inheritance, nor to any office of partner- " ship, or the keeping of any house, park, manor, garden, " chace, or forest."

Law v. Law. 3 P. Wms. 391.

As where the plaintiff having procured for his brother (the defendant's testator) a place in the excise by his interest with the commissioners, and the testator gave him a bond conditioning for the payment of 10*l.* a year during his life ; he died, having omitted payment for some years before his death : and the plaintiff having put the bond in suit, equity relieved the defendant against it, as occasioning extortion, corruption, and the sale of offices.

Culliford v. De Cardonell. Salk. 466. [180]

But it has been decided. that where an office is within the statute, and the salary certain, if the principal *makes a deputy*, reserving by bond a lesser sum out of the salary, it is good, or if the profits are uncertain, reserving a part (as half the profits) it is good, for the fees still belong to the principal in whose name they must be sued for. But where a person so appointed gives a bond to the principal to pay him a sum certain, without reference to the profits, this is void under the statute.

Godolphin v. Tudor. Salk. 468.

4. Of Bonds whose Consideration is Simony.

As to this, it is enacted by stat. 31 *Eliz. c.* 6. " That if " any persons, bodies politic or corporate, which shall have " election, presentation, and nomination or voice, or assent " in the election, &c. of any fellow, scholar or other person " to have place in any cathedral or collegiate churches, col- " leges, schools, hospitals, halls, or societies, shall take any " money or other profit, or any promise or assurance to re- " ceive any money or other profit, either to themselves or " their friends, the place of the person so offending shall be " void."

By *s.* 6. " If any person shall for any money or profit, or " for any promise and assurance of money or profit, admit, " institute, instal, and induct any person into any benefice with " cure of souls, dignity, prebend, or other living ecclesias- " tical, every such person shall forfeit the double value of " the living, and the benefice be void."

Under this statute it has been decided,

Baker v. Rogers. Cro. Eliz. 788.

1. If the *church is void*, a bond given for the purchase of the presentation is clearly simony, and therefore void.

2. So

2. So if given for the next *presentation*, the incumbent being *in extremis*, it is simony. Winchcomb v. Bishop of Winchester. Hob. 165.

But the purchase of the *advowson in fee*, the incumbent being on his death-bed and in fact dying the next morning, is not simony: for an advowson is a temporal and valuable right, and so capable of sale, and not simony, particularly where it appeared that such was not known to the person presented. Barret v. Glubb 2 Black. Rep. 1052.

3. And as to presentations during incumbency, it is enacted by stat. 12 *Ann. c.* 12. "That if any person shall for "money or profit, in his name or that of any other, pro- "cure the next presentation to any living ecclesiastical, "and shall be presented and collated thereon, every such "presentation shall be void, and such agreement shall be "deemed a simoniacal contract." [181]

But to this are certain exceptions, which, though founded on decisions previous to the statute, still are law. 2 *Black. Com.* 280.

As 1st, If a father purchases the next presentation of a living *as a provision for his son*, it is not simony and this though the son was present at the making of the agreement; for a father is bound to provide for his son. Smith v. Shelbourn. Cro. Eliz. 685.

2. Bonds given to pay money *to charitable uses*, or as in this case, that the person presented should pay 10*l.* yearly to the son of the late incumbent while at the university, on receiving the presentation, are not simoniacal, provided the patron or his relations are not benefited: as it would be if the 10*l.* had been reserved to the *patron's* son; for it is essential to simony that the person presenting does it from some corrupt motive of profit to himself. Abigail Baker. v. Mountford. Noy. 142.

"And in general where the condition of the bond is to "enforce what it is the duty of the incumbent to do, such "shall be deemed legal."

As where in debt on a bond against the defendant as incumbent of *W.* in *Derbyshire*, the condition of the bond was, that he should constantly and duly reside at the *curacy house*, in and upon the curacy, or in default of such residence that he would resign within one month after request, and that he would not commit or suffer any waste or dilapidations on the house, lands, &c. during the time he should continue curate. This condition was on demurrer adjudged to be good and legal, as being for the purpose of securing a performance of all those duties which by law he was bound to discharge. Bagshaw v. Brosly. 4 T. Rep. 78.

3. *General* bonds of resignation have been held to be legal by many decisions, upon the presumption that they might be to enforce some duty from the incumbent, *which was not contrary* Peel v. Lord Carlisle 2 Stra. 220. Babbington v. Wood. Hutt, 111.

Fytche v. Bishop of London. In dom. Proc. May 1783.

contrary to law, as to resign when the patron's son came of age: but these bonds are now held to be illegal by a modern decision: but *quære* if bonds to resign, as to provide for a son, or in case of non-residence, *if expressed in the condition of the bond*, are not still legal?

Patridge v. Whiston. 4 T. Rep. 359. [182]

For in this case, which was debt on a bond from the defendant on his presentation to a living, conditioning to resign it when the *patron's* son was ordained and could be presented, and the defendant relied on the agreement being simoniacal: the Court on demurrer gave judgment for the plaintiff.

5. Of Bonds void in Law, whose Consideration is malum in se. *Justin. Instit. Lib.* 3 *tit.* 20.

Co. Litt. 206. b.

1. As if a man be bound in an obligation, the condition of which is, *that he shall kill J. S.*, the bond is void.

Walker v. Perkins, administ. of Perkins. 3 Burr. 1568. 1 Bl. Rep. 517. S. C.

2. So where the defendant's intestate gave to the plaintiff a bond the condition of which was, *that the plaintiff should live with him in a state of fornication*, and that he should leave her an annuity of 60*l.* a year; the bond was held to be illegal and void.

Turner v. Vaughan. 3 Wils. 339.

But if a man *debauches a woman before chaste*, or having seduced a woman before virtuous, gives her a bond as a recompense, or a provision for her future support, it is *præmium pudoris*, and good in law.

And the practice of courts of equity is to the same effect.

Marchioness of Annandale v. Harris. 2 P. Wms. 432.

For if a common strumpet obtains a bond from an inexperienced person, equity will set it aside. But where a man debauches a woman, and gives her a bond, it is *præmium pudicitiæ*, and the injury a sufficient consideration. And where such a bond was given, and the obligor by deed agreed that the sum should be laid out in an annuity for the woman, the execution of the bond not being proved, the party failed at law, but equity relieved the woman to its extent from the recital in the deed.

3. "The last class of bonds void in law, are those which "are not founded on any express prohibitory statute, but "are against the common law, founded on the rule of law, "*That contracts, which it is contrary to the good policy of the* "*statute to support, are void.*"

These are, 1st. Bonds given in restraint of trade. 2dly, Bonds given in restraint of marriage, and marriage brokage bonds. 3dly, Bonds given for withholding evidence. 4thly, Bonds abridging persons of the rights or powers annexed to any office by law.

1. Of

1. Of Bonds in Restraint of Trade.

1. " General Bonds given *not to follow a trade* are void.

But this is to be understood with some restrictions.

Bonds conditioning generally that the obligor shall not follow a trade, even if a consideration appears, are void; for it is for the public good that every one should follow the business he is fit for, and the courts never support such impolitic restrictions; but particular restraints (as not to follow a trade in such a street) may be good in law, in that case only *where a consideration appears*. But without such consideration they are void.

Mitchell v. Reynolds. 1 P. Wms. 181.

Broad v. Jollyfe. Cro. Jac. 739.

As where in consideration that the obligee took the obligor of the bond, and instructed her in the obligee's business, *without any fee*, the obligor covenanted in a penalty *not to follow that trade within half a mile of the obligee's then dwelling, or where she should after be*. This bond was held to be good, for it was only a particular restraint, and a consideration appeared, *viz.* instruction in the obligee's business without a fee.

Chesman v. Nainby. 2 Stra 739.

So where the condition of the bond was, that the plaintiff should take the defendant as his assistant in the business of a surgeon, for so long a time as it should please the plaintiff, and the defendant, in consideration thereof, agreed not to practise for fourteen years within ten miles of the town wherein the plaintiff resided, this bond was adjudged to be good. For there was a good consideration, the credit and advantage to be derived from the defendant's situation with the plaintiff.

Davis v. Mason. 5 T. Rep. 118.

But if the condition of the bond is, that the defendant shall buy but *a certain quantity* of the articles he deals in, or *only of certain persons*, or *at such and such times*, the condition shall be deemed as a restraint of trade, and void in law.

Thompson v. Harvey. Show. 4.

2. " And so though the bond is not absolutely prohibitory " of the obligor's following a trade, but *that* if he does so " within the place restrained, *he shall pay a sum of money*, it " is void, for its effect is in restraint of trade."

As where the condition of the bond was, that if the defendant's son should follow the business of an haberdasher within the county of *Kent*, or city of *Rochester* or *Canterbury*, that he should pay to the plaintiff 20*l*. It was adjudged to be void as a restraint of trade.

Colgate v. Batchelor. Cro. Eliz. 872.

2. Of Bonds in Restraint of Marriage, and Marriage Brokage Bonds.

1. " Bonds, whose conditions are *in restraint of marriage*, " are void on the same principle of impolicy as those in " restraint of trade."

As

Lowe v. Peers. 4 Burr. 2225.

As where the defendant gave to the plaintiff a promise of marriage, under seal, in these words: "Hereby I promise Mrs. *Catharine Lowe* that I will not marry with any person beside herself; if I do, I agree to give her 1000*l*. *N. Peers*," The defendant having married another, was sued on this covenant, and the plaintiff had a verdict. But judgment was arrested: for it was not a covenant absolutely to marry, but to restrain the defendant from marrying any other person, though the plaintiff was not bound to marry him; and so being in restraint of marriage, was adjudged to be void.

Hall v. Potter. 3 Lev. 411.

2. Bonds given to *procure a marriage with any* person are void. For in general all marriage brokage bonds are void.

Turton v. Benson. 1 Stra. 240.

3. Bonds given *to refund part of a marriage portion* are void, as fraudulent on the contracting parties.

Woodhouse v. Shipley. 2 Atk. 535.

4. Bonds given to each other by a man and woman, under a penalty, *to marry after the death of the father* of one of the parties, are void. For it is a partial restraint, and fraud on the parent, and tends to encourage the disobedience of children.

Duke of Hamilton v. Lord Mohun. 1 P. Wms. 118.

5. So where the plaintiff undertook by bond that in consideration of the defendant's giving his consent that his ward should marry the plaintiff, *that he would release all sums due by the defendant to his ward's estate*, This bond was deemed to be void.

Note, These cases are inserted here for the sake of uniformity, being the proper objects of relief in a court of equity; though according to the doctrine in 2 *Wils.* 348, such illegal consideration might be pleaded to an action of debt on the bond.

3. Of Bonds given for the withholding of Evidence.

All such bonds are illegal and void.

Mason v. Wilkins. 2 Vent. 109. Collins v. Blantern. 2 Wils. 344.

As where the defendant and others being indicted for perjury by one *Rudge*, the plaintiff gave his note to *Rudge* for a sum of money to induce him not to prosecute; and the defendant, to indemnify the plaintiff against the note, gave the bond in question. *Rudge* did not prosecute; and

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the plaintiff paid him the amount of the note, and then sued the defendant on the bond, who having pleaded the consideration, it was resolved, that the note being given for an illegal purpose, (the compounding the prosecution,) and the bond given to secure and repay that, that the bond was illegal and void.

4. Of

4. Of Bonds abridging the Rights or Powers annexed to any Office by Law.

"Wherever by law particular powers or rights are annexed to any office, bonds limiting or abridging the exercise of those powers are void."

As where the plaintiff, who was sheriff of *Hampshire*, on his appointing a person his under-sheriff, took a bond from him and the defendant as his surety, one condition of which was, "that the under-sheriff should not execute any extent, liberate, elegit, or other process of execution, for any sum above 20*l.* without first acquainting the plaintiff, (the sheriff) with the same, and getting his special warrant for the execution." To debt on this bond the defendant demurred, when it was resolved, that the office of under-sheriff is of long use, and, as deputy to the sheriff, he is invested with all the rights of office of the sheriff himself, such as executing process, executions, &c. that the sheriff therefore cannot make an under-sheriff without giving him those powers, or abridge him of any part of them. That this condition, therefore, being to deprive the under-sheriff of one of the rights annexed by law to his office, was illegal and void. Sir Daniel Norton v. Simes. Hob. 12.

For it is essential to the appointment of a deputy, that he be invested with all the power and authority of his principal; and any covenant or condition to restrain it, is void in law. Parker v. Kett, Salk. 95.

But under this head of bonds void for the illegality of the consideration, two cases deserve notice. The first is, "that "though money has been lent *to be applied* to uses contrary "to law by the obligor of the bond, and that known to the obligee himself, (the lender of the money,) the bond is good. "Though if the bond had been given to discharge a debt arising from an illegal transaction between the obligor and the obligee, it had been otherwise."

* As where the plaintiff and one *Richardson* were jointly concerned in certain stock-jobbing contracts, which were contrary to statute 7 *Geo.* 2. *c.* 8. and the plaintiff having paid 3000*l.* on that joint account, the bond in question was given by the defendant for the repayment of a moiety of that sum by *Richardson*. On debt brought on the bond this special matter was shewn, and on demurrer the Court was of opinion, That as between the plaintiff and the defendant it being a fair loan of money, and nothing illegal, the bond was good: but had it been given *for the money due on the contract for stock*, contrary to the statute, it had been void. Faikney v. Reynous. 4 Burr. 2069. Petrie v. Hannay, ante 89. S. P. *[186]

Secondly,

Secondly, "If a bond is for performance of articles of "agreement, and part of them are contrary to law, though "part of them are legal, yet is the bond void *in toto*.

Lee & Ux. v. Coleshill. Cro. Eliz. 529.

As where in debt on a bond for performance of covenants in an indenture, they appeared to be that the defendant covenanted that he being customer of *London*, had made one *Smith* (who was the plaintiff's testator) his deputy, and that he would surrender his letters patent, and procure others appointing *Smith* and him to the office, and that if *Smith* died living the defendant, that he would pay to his executor 300*l*. for which this action was brought. The defendant pleaded the statute 5 *Ed.* 6. *c.* 16. against the sale of offices. The plaintiff insisted, that part of the covenant being good, that the obligation should be good as to these: but it was adjudged that the whole obligation was void, for so by putting in one good covenant, the whole statute would be evaded.

2. Bonds void by Matter subsequent, are these;

Co. Litt. 206. a. b.

1. If the condition of a bond is possible at the time of making (as if the condition be that *J. S.* shall marry *A. B.* within a month) but before the time come it becomes impossible, first, *By the act of God* (as if *A. B.* dies within the time;) or secondly, *By the act of the obligee himself* (as if he marry her himself;) or thirdly, *By the act of Law* (as by *A. B.* marrying another, so that to marry *J. S.* is contrary to law;) in all these cases the obligation is saved, and the bond void.

Ibid.

But if the condition of a bond is impossible at the time of making, as that the obligor shall go to *Rome* in a day, the bond is not void, but is single, that is for the payment of money without any condition.

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Laughter's case. 5 Co. 21. b.

2. If the condition of a bond consists of two parts in the disjunctive, and both are possible at the time of the bond (as where it was that the defendant should either purchase to the use of *J. S.* his heirs, &c. lands of a certain value, or leave to the said *J. S.* by legacy, or otherwise, money to such an amount, that then, &c.) and one becomes impossible by the act of God, the obligor is not bound to perform the other part, for the condition is for the benefit of the obligor, and he has his option to perform either part to save his condition; and when deprived of one by the act of God, he shall not be called on to perform the other.

2. or

2. OF DEBT FOR RENT.

1. "At common law no action of debt lay for the ar-
"rears of a freehold rent, during the continuance of the
"lease."

Therefore if there was a lessee for life, and the lessor died, and the rent being in arrear, such rent was not recoverable during the continuance of the life-estate; for the arrears belonged to the executor, but could not be recovered, as no action of debt lay for them, and the heir had no title to the rent which became due in the lifetime of the ancestor. Andrew Ognel's case, 4 Co. 49. Co. Litt. 162. a.

"But after the determination of the estate for life, the
"arrears then due were recoverable at common law by
"action of debt, for the sum due was not as a freehold
"rent, but as a personal charge." S. C. & Roll. Abr. 595. Co. Litt. 162. a.

2. But a change was effected by statute 32 *H.* 8. *c.* 37. which enacts, "That the executors or administrators of a
"tenant for life (that is *pur autre vie*, living *cestui que vie*,
"*Co. Litt.* 169.) in tail or in fee, may have an action of
"debt to recover all arrearages of rent due in the lifetime
"of the lessor, and during the continuance of the estate for
"life, from the tenant for life, who continues in posses-
"sion, and ought to have paid the rent to the lessor when
"living, or against the executors or administrators of such
"tenant."

And by the 3d sect. of the same statute, "The husband
"may have debt for arrearages during the lifetime of his
"wife, in her right." [188]

This statute only provided for the recovery of the rent in arrear at the death of the lessor, but gave no action of debt to him during his life, so that during that time his only remedy was an assize. But that was provided for by statute 8 *Ann. c.* 14. *s.* 4. which enacts, "That any person entit-
"led to rent arrear on a lease for life or lives, may have an
"action of debt *during* the existence of the life, as on a
"lease for years during the term." Bishop of Winchester v. Wright, 1 Lord Raym. 1056.

3. Such was the case of rents reserved on freehold leases; but rents reserved on *leases for years* were at all times recoverable by action of debt. Litt. sect. 59.

4. So where there is *tenant at will*, with a rent reserved, the lessor might always have an action of debt for arrears of rent. Litt. sect. 73.

5. As to *tenants at sufferance*, it seems that an action of debt lay not against them for rent arrear, for the contract

was determined, and they were in by wrong; but in such cases there is now a special provision made by stat. 4 *Geo.* 2. *c.* 28. which enacts, "That if tenants for life or years, "or persons coming in under or by collusion with them, "*hold over*, after determination of their estates, after de- "mand made in writing for delivering possession thereof "by the person having the reversion or remainder therein "or his agent, such tenant shall forfeit *double the value* "of the premises, to be recovered in an action of debt."

And by stat. 11. *Geo.* 2. *c.* 24. *s.* 18. it is enacted, "That in case any tenant shall give notice of his inten- "tion to quit the premises, and shall not accordingly de- "liver up the possession at the time in such notice con- "tained, the said tenant, his executors or administrators, "shall pay to the landlord *double the rent which he would "otherwise have paid.*"

Upon these statutes several decisions have taken place.

Wilkinson v. Colley. 5 Burr. 2694.

1. *A receiver* appointed under an order of the Court of Chancery, is "an agent properly qualified" within the words of the statute; and if he gives notice to the tenant to quit, and the tenant holds over, he shall forfeit the double value.

S. C. [189]

2. Where the statute says, "After demand and notice in writing," the notice in writing is of itself a sufficient demand.

Cutting v. Derby. 2 Bl. Rep. 1075.

3. The notice to quit, under stat. 4 *Geo.* 2. may be *before* the expiration of the lease or time of demise.

Doe ex dem. Parry v. Hazell. Espin. Cas. N. P. 94.

And the notice to quit has in all cases reference to the taking; so that where premises are let by the month, a month's notice to quit is sufficient.

S. C. 1077.

4. One tenant in common may maintain this action for the double value of his moiety.

Timmins v. Rowlinson. 3 Burr. 1603.

5. The notice *by the tenant* to quit, under stat. 11 *Geo.* 2. need not be in writing. A parol notice to quit is sufficient.

S. C.

6. A parol demise from year to year is a sufficient holding within the statute, so as to subject the tenant to the penalty of double rent, if he holds over after he has given notice to quit.

6. "By stat. 11. *Geo.* 2. *c.* 19. *s.* 12. "If an ejectment is "served on any lands, &c. if the tenant does not give notice "to the person of whom he holds, of the service of such "ejectment, he shall forfeit three years rent of the premises, "to be recovered by action of debt."

3. or

3. OF DEBT ON MATTERS OF RECORD.

These are, 1st, On Bail Bonds and Recognizances. 2d, On Judgments. 3d, For Amercements in inferior Courts. 4th, For Costs. 5th, On Statutes and Recognizances.

1st, Of Debt on Bail Bonds and Recognizances.

1. By stat. 12 *Geo.* 1. *c.* 29. it is enacted, "That no "person shall be held to special bail on any process issuing "out of any superior court where the cause of action shall "not amount to 10*l.* or upwards; and in such case affi- "davit shall be made of the cause of action, and the sum "specified in such affidavit shall be indorsed on the back of "the writ or process; for which sum so indorsed the sheriff "shall take bail, and for no more."

But if the sheriff does take bail for more than the sum sworn to and marked on the writ, it is not for that reason void, though he may be punishable. Nadenby v. Horsley. 2 Wils. 69.

This statute therefore settles the only cases in which a bail-bond is to be taken, *viz.* when the debt amounts to 10*l.* or upwards; and the manner of taking the bond is settled by stat. 23 *H.* 6. *c.* 10 *s.* 1. which enacts, "That "the sheriffs shall let out all persons in their custody, by "force of any writ, bill, or warrant, in any action per- "sonal, or by cause of indictment of trespass upon reason- "able sureties, except such persons as are taken by execu- "tion, *capias utlagatum*, *excommunicato capiendo*, surety of "the peace, or such as are committed by special command "of the justices. [190]

"And no sheriff shall take any obligation for any cause "aforesaid, but to themselves by their name of office, with "condition that the defendant shall appear at the return of "the writ at the place required in the writ: and, if the obli- "gation is taken in a different form, it is void."

Under this statute it has been decided,

1. "The undertaking for the appearance of the defend- "ant must be *by bond*:" for where it was an undertaking in writing only to the following effect: That one *Stephens* having been arrested by the plaintiff (who was bailiff to the sheriff of *Surry*) on a writ for 35*l.* the defendant undertook to put in good bail on or before the return of the writ, or to surrender the body of *Stephens* to the plaintiff, or on default to pay the debt and costs. Afterwards the plaintiff was obliged to pay the money, the defendant not having performed any of the conditions and brought *assumpsit* for the money so paid, against the defendant on this undertaking, when the Court held, That the statute having pointed out the mode, *viz.* Rogers v. Reeves. 1 T. Rep. 418.

viz. by bond, that it was to be pursued; and that a simple contract undertaking was void.

Scryven v. Dyther. Cro. Eliz. 672.

2. "So the bond must be "*with sureties*," for such are "the words of the statute." Therefore where the bond was only by the *defendant himself*, conditioning, that he the said *R. Dyther* would personally appear before the King's Majesty at *Westminster*, *die Pasch.* 15 *dies*, to answer, *&c.* it was held to be bad. But a case was quoted of a Sir *W. Drury*, wherein it was held, That an obligation with *one surety* was good.

Per Buller. 1 T. Rep. 122. Symes v. Oakes. 2 Stra. 893.

3. "So the bond must be made to the sheriff *by his name* "*of office*;" but the Court held, that though such ought to be the form, yet that in this case the bonds being laid *solvend. eidem vicecom. & assign.* was sufficient.

Bennet v. Filkins. 1 Saund. 20. [191]

4. "The condition must be to appear *at the return of* "*the writ*;" for where the sheriff took a bail-bond for the appearance of the defendant *at a day different from that in the writ*, it was held to be void.

Samuel v. Evans. 2 T. Rep. 560.

So where the condition of the bond was for the defendant to appear on the Morrow of *All Souls (3d of November)*, and the date of the bond was the *4th of November*, it was adjudged to be void.

"But if the substance of the return appears in the bond, "the very words of the writ need not be set out."

Shuttleworth v. Pilkington. 2 Stra. 1156.

For where the writ was returnable *coram domino rege ubi cunq. fuerimus in Anglia*; and the bail-bond wanted those latter words, it was nevertheless held good.

5. "The statute extends only to cases *on mesne process*; "and all other obligations made to the sheriff are void.

Empson v. Bathurst. Hutt. 52.

For where the bond was given to the under-sheriff for a sum for fees of executing an extent, it was adjudged to be void under stat. 23 *H.* 6. for one view of the statute was to prevent extortion by confining the obligation only to the condition of appearing. *Cro. Eliz.* 808.

Mills v. Bond. 1 Stra. 399.

"And it must be founded on good and legal process;" for where it was taken on a writ which appeared to be returnable on a day out of term; the writ being void, the bail-bond was held to be so too.

Though under the statute, if the defendant did not appear, the bond was forfeited, yet the plaintiff was delayed in his suit; for remedy of which, and to expedite the proceedings, it was enacted by stat. 4 & 5 *Ann. c.* 16. *s.* 20. "That if "any person shall be arrested by process out of the courts "at *Westminster*, at the suit of a common person, and "the sheriff or other officer take bail, the sheriff at the re- "quest and costs of the plaintiff, or his attorney, *shall assign*

"assign *the bail-bond*, by indorsing the same, and attesting it "under his hand and seal, in the presence of two witnesses "without stamp, provided it be stamped before action brought "thereon ; and if the security be forfeited, the plaintiff af- "ter assignment may bring an action thereupon in his own "name."

1. As the appearance-day is the *quarto die post* the return-day, the assignment should not be made *till the four days are expired*. Studley v. Sturt. 2 Stra. 782.

But of the four days the return-day itself is exclusive, and the day following is counted the first ; and therefore where the return day was on a *Wednesday*, the bail-bond was held not to be assignable till after *Monday*, for *Sunday* is not to be reckoned as one of them ; and where it is the fourth day, the party shall have all *Monday* to put in his bail. Bullock v. Heather. 2 Stra. 914. [192]

2. The sheriff may assign the bail-bond in any county, and the plaintiff has his election to bring his action either in the county where the assignment was made, or in the county to the sheriff of which the writ was directed : as here, where the writ was into *London*, and the assignment in *Middlesex*, where the action was brought. Gregson v. Heather. 2 Stra. 727.

3. The sheriff, or under-sheriff, may make the assignment of the bail-bond, and these only can make it ; for where in this case the assignment was proved to have been made by the under-sheriff's *clerk*, it was adjudged to be bad. Kitson v. Fagg. 1 Stra. 60.

4. And the action on the bail-bond must only be brought in that court where the bail was given, or otherwise the proceedings will be stayed, for the writ gives jurisdiction to that court only. Walton v. Bent. 3 Burr. 1923. Morris v. Rees. 3 Wils. 348 S. P.

It was formerly a doubt whether the statute 23 *H.* 6. was not a private act : but in the case of *Saxby versus Kirkus*, *Buller*, *N. P.* 224. it was held that the statute 4 & 5 *Ann. c.* 16. by recognizing it, had made it a public act, and accordingly where the plaintiff had declared as assignee of the sheriff ; but in setting out the bail-bond, it appeared not to be within the statute, and so void ; the Court held, That they could take no notice of the statute of *Hen.* 6. without its being pleaded, and that the judgment might be arrested after the plea of *non est factum*. Samuel v. Evans. 2 T. Rep. 569.

2. "Such are the cases of bonds given on mesne process. "I shall now consider the recognizance entered into by the "bail above ; whereby they undertake that if defendant be "condemned in the action, that he shall pay the costs and "condemnation, or render himself up a prisoner, or that "they will pay it for him."

Upon

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Upon this recognizance the plaintiff in the original action may have debt against the bail, in case of the default of the principal; but as the declaration is very prolix, it is more usual to sue the bail by *scire facias*; and debt is only adviseable where the principal has run away, and the bail are likely to become insolvent; and for this reason, that in debt on the recognizance the bail are held to special bail, but not so on a *scire facias*.

But as debt may be brought against the bail, it will be proper to consider the cases on that head.

Hobs v. Tedcastle, Cro. Eliz. 597.

1. Before the plaintiff can proceed against the bail, either by debt or *scire facias*, there must issue a *ca. sa.* against the principal (the defendant in the action;) for one of the conditions of the recognizance was, that the defendant's body should be had in execution; and therefore the recognizance is not forfeited till that is not forth-coming, which is only judicially known by the return of *non est inventus* on the *ca. sa.*

Price v. Price. Cro. Eliz. 733.

Therefore where the bail brought error and assigned it, that judgment was given against them without any *ca. sa.* having been awarded against the principal, judgment was for that fault arrested.

2. But a difference is to be observed where the proceedings are in debt on the recognizance, and by *scire facias*.

"For if the plaintiff brings debt on the recognizance against "the bail, they can surrender their principal *before the re-* "*turn of the process against them*, but not after."

Hoare v. Mingay. 2 Stra. 915.

For where the plaintiff having brought his action on the recognizance in *C. B.* but finding that the defendant (the bail) was an attorney of *B. R.* was forced to desist, and filed his bill in *B. R.* the first day of *Michaelmas* term; on the 20th of *October* the defendant had surrendered his principal: on motion, the proceedings were stayed; for those in *C. B.* were of no avail, and the render of the body being before return of the process, was time enough: for the plaintiff should have commenced his action in the proper court at first.

Milner v. Pettit. 1 Lord Raym. 720.

And where the plaintiff brings debt against the bail, they shall have eight days after the return of the writ to surrender the principal: and if there are but four days in the term after the return, they shall have four days in the term following.

Walmsley v. Havand. Cro. Eliz. 618.

But where the plaintiff proceeds by *scire facias*, upon *non est inventus* returned, the bail have till the return of the second *scire facias* to surrender the principal and discharge themselves.

And

And the first *scire facias* may be tested of the same day the *ca. sa.* is returnable. Steward v. Smith. 2 Stra. 866.

And there should be fifteen days between the teste and the return of each *scire facias*. Alyson v. Byston. Cro. Eliz. 738.

Therefore where the *ca. sa.* was returnable *cras. Trin.* 7th of *June*, and the first *scire facias* was returnable *(Quinden. Trin.* 21*st. June, but the last on Tres. Trin.* 28*th June)* this last was quashed, there not being fifteen days between the teste and return. Peale v. Watson. 2 Bl. Rep. 922.

" But this allowance of time till the return of the second " *scire facias*, is not matter of right but of favour."

For where the principal died before the return of the second *scire facias*, the bail were held to be liable. And in a yet stronger case, Glyn v. Yates. 1 Stra. 511.

Where the principal died after the return of *non est inventus* and before any *scire facias* issued, yet were the bail held to be charged: for in strictness of law the bail are chargeable after the return of *non est inventus*, and the *scire facias* is merely *ex gratia*. Barry v. Barry. 2 Stra. 917. 2 Wils. 67.

2. " But in the following cases the bail shall be discharged."

1. " Where there has been an actual surrender."

But where the action has been *by original*, the bail need not surrender on the return-day of the *scire facias*, but have till the appearance-day, that is, the *quarto die post*, to do it. Bailey v. Smeathman. 4 Burr. 2134.

" And the surrender must be during the sitting of the " court."

For where on the second *scire facias* issued against the bail, they surrendered the principal on the *quarto die post to a judge at his chambers*, the surrender was held to be too late, and the bail fixed with the debt and costs. Simonds v. Middleton. 1 Wils. 269.

However, before the bail are absolutely fixed where a surrender can be made, they should be summoned time enough to make a surrender of their principal; for where in this case the *scire facias* was returnable the 14th of *November*, and the bail were not summoned till about an hour before the rising of the court, and the sheriff returned *scire feci*, the court set the proceedings aside, holding that summons insufficient, as being too short notice. Webb v. Harvey. 2 T. Rep. 757.

2. " If an actual surrender cannot be made." [195]

As where the principal *became a peer*, so that by law his body could not be surrendered, it was held that an *exoneretur* should be entered on the bail-piece. Trinder v. Shirley. Dougl. 45.

Yet

Ibbotson v. Lord Galway. 6 T. Rep.

Yet where the principal became a lunatic, on motion for leave to enter an *exoneretur* on the bail-piece, the Court refused to permit it.

Bond v. Isaac. 2 Burr. 339.

So where a man *had been pressed* and was then in custody, and so that by stat. 29 *Geo. 2. c. 4. s. 14.* he could not be taken out of his majesty's service, except for a criminal matter, his bail in a civil action were allowed to bring him into court by *habeas corpus*, and surrendered him by committing him to the custody of the marshal, and *instanter* remanding him to the *Savoy*, after entering an *exoneretur* on the bail-piece.

3. "Though the defendant has judgment in the court be-"low, yet the bail are not thereby actually discharged."

Loff v. Kelbridge. Cro. Jac. 94.

For if error be brought on that judgment, and it be reversed, the bail still are liable, though the condition of the recognizance was to surrender, &c. *if condemned in the action, in the said court*; for the judgment being reversed, it is as if it never had been.

Meyer v. Arthur. 1 Stra. 419.

4. But if the plaintiff has judgment, and the defendant brings a writ of error and a *sci. fa.* is sued out, *proceedings will be stayed against the bail*; but it is on the terms of the bail's consenting that if the judgment be affirmed, they shall surrender the principal, or give judgment on the *scire facias*.

1. "But it must be on application by the bail, *before judg-*"*ment against them had on the scire facias.*"

Fisher v. Emerson. 1 Stra. 526.

For where the plaintiff got judgment on the *scire facias* against the bail, pending error by the principal, and took them in execution, and they moved to be discharged; *per cur.* if the bail had applied before judgment, the court would have stayed proceedings: or if an action of debt had been brought on the judgment, they would have granted an imparlance; but the bail by suffering judgment to go, have submitted to meet the plaintiff, and the judgment must stand.

Everett v. Gery. 1 Stra. 443.

2. So the bail must apply to stay proceeding *before the return of the second scire facias*: for after the return of the second *scire facias* the bail cannot surrender the principal, and therefore are fixed with the debt and costs.

Wicksted v. Bradshaw. Mob. 116. [196]

"And the reason of these decisions is this:" That pending a writ of error, the court cannot award execution, so that no *capias* can go against the principal; and therefore as the bail cannot take and surrender him, they shall not be charged.

Hunter v. Sampson. 2 Stra. 781.

3. But the court will not stay proceedings against the bail merely on *bringing* a writ of error, unless bail to the writ of error has been actually put in; for till then it is no absolute supersedeas.

So

So if the writ of error appears to be brought merely for the purpose of delay, as where it was sworn that the defendant and his attorney had declared that they would delay the plaintiff by every means possible, the court refused to stay the proceedings against the bail. Pool v. Charnock, 3 T. Rep. 79.

2. Of Debt on Judgments.

1. "If a man recovers in the *superior courts* a debt or "damages for any injury, in any action real or personal, he "may afterwards have an action of debt on that judgment." Speak v. Richards, Hob. 206. S. C. Noy. 22, Cro. Car. 539.

This was the common law remedy in cases where execution had not been sued out before the expiration of the year and day after the judgment. But the statute of *Westminster* 2d. *c.* 45. having given the *scire facias* on the judgment, that is the practice now.

But however, debt is still often brought on judgments: and it will lie for the *remainder of the sum recovered*, where part has been levied on the goods of the defendant: so it will lie pending a writ of error. *Gribble* v. *Abbot. Cowp.* 72. Glascock v. Morgan, 1 Lev. 92.

"But the judgment must be an actual and subsisting judg- "ment at the time of the action brought; for if by any "means it has been discharged, this action will not lie." 7 Mod. 62. 14. Sid. 236.

For where the defendant's person had been taken in execution by a *ca. sa.* on the first judgment, and had been afterwards discharged out of custody, by consent of the plaintiff, on the defendant's entering into an agreement to pay certain sums at certain stipulated times, part whereof he had paid when the plaintiff brought debt on the judgment for the *whole*: but the action was held not to lie, for the judgment was discharged by the plaintiff's own consent; and so he could not have an action on it. Vigors v. Aldrich, 4 Burr. 2483.

So where to an action of *assumpsit* the defendant pleaded a set-off of a judgment recovered by him, *Trin.* 22 *Geo.* 3. against the plaintiff, the plaintiff replied and admitted the judgment, but said, that in *Mich.* 23 *Geo.* 3. he had been charged in execution by virtue of such judgment, and that *on the 6th of Feb.* 1783 *he had by the consent, privity, and authority of the defendant, been discharged out of custody*, and from the said execution. The defendant rejoined that the discharge was in consideration of the plaintiff giving him a bond to the amount of the debt to secure an annuity, which annuity-bond, &c. had been set aside by the court of *C. B.* the memorial having been erroneously entered: to this was a demurrer, where it was held clearly, that the first judgment was completely at an end by discharging the plaintiff out of custody, and that the defendant could therefore never Jaques v. Withy, 1 T. Rep. 557. [197]

resort to it again, even though the consideration had failed, for which he had discharged him.

Walker v. Witter. Dougl. 1.

2. *Debt* will lie upon a *judgment of a foreign court*, (as in this case the supreme court of *Jamaica*,) but it is not to be declared on as a matter of record, for it is here but of the nature of a simple contract debt; therefore in such case the judgment is sufficient only to establish a demand and put the defendant to impeach the justice of it, or shew the same to have been unduly or irregularly obtained.

Crawford v. Whittal. Hil 13 G. 3. Sinclair v. Fraser. Dougl. 4. Anon. 2 Vern. 540. Shaw v. Thompson. Cro. Eliz. 426.

And as it is but a simple contract, *assumpsit* will also lie on it; as was decided in the two cases here mentioned; one of which was from *Jamaica*, and the other from *Bengal*. And in another case from *Vernon*, where the judgment was from *France*, and held that *assumpsit* would lie.

So debt was adjudged to lie for a sum recovered in a *court baron*.

3d, Of Debt for Amercements in inferior Courts.

Earl of Lincoln v. Fisher. Cro. Eliz. 581.

As where the steward of a court leet amerced a person for contemptuous words: it was adjudged lawful, and that debt lay for it.

Wicker v. Norris. Bull. N. P. 167.

So debt lies for an amercement in a court baron.

4th, Of debt for Costs.

Murray v. Wilson. 1 Wils. 326.

Debt lies to recover the *costs of a nonsuit* in an inferior court, by the defendant below: and a general declaration is good, without setting out that the cause of action arose within the jurisdiction of the inferior court, or the proceedings at length.

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5th, Of Debt on statutes and recognizances.

1 Roll. Abr. 599.

1. Debt lies on a statute merchant, and also on a statute staple, for both are under the seal of the parties and have all the solemnities of an obligation.

Ascue v. Hollingworth. Cro. Eliz. 494.

So where an obligation was entered into as a statute staple, but was void *as a statute*, for want of two seals in pursuance of the statute of *Acton Burnell*, yet the plaintiff was allowed to bring debt on it, as an obligation; and he recovered.

Trott v. Spurling. Moor 118. Chamberlain v. Thorp. Cro. Eliz. 187.

2. So upon a *recognizance* taken in pursuance of stat. 23. *H.* 8. *c.* 6. before the Chief Justices of the *King's Bench* and *Common Pleas*, or the mayor of the Staple at *Westminster*, out of term, and the recorder of *London* jointly, for payment

ment of money, and on which the process is the same as upon statutes staple, debt will lie, by stat. 8 *Geo.* 1. *c.* 25.

So if the recognizance is taken in *Chancery*, debt lies on it. Cowper v. Langworth. Cro. Eliz. 608. Roll. Abr. 600. Danv. 498.

And in like manner if the tenor of the recognizance so taken is certified into the *King's Bench:* for the tenor under the great seal is of the same notoriety and validity as if the original under the seal of the conusor had been produced.

2. DEBT WITH REFERENCE TO THE PERSON.

This is first, As to Persons in general, 2d, as to the Heir, Executor, or Administrator. 3d, As to Baron and Feme. 4th, As to Assignees. 5th, As to sheriffs and their Officers.

1. AS TO PERSONS IN GENERAL.

"No one shall be charged in debt on any bond or obligation *to any matter, or to any person not mentioned or included in it;* for its extent shall be strictly limited to the condition."

As where a bond was entered into by the defendant as surety for one *Hampton*, conditioning for his service and faithful account of all monies of the obligee, his executors or administrators, which should come to the hands of the said *Hampton*, while he served the obligee as his clerk. The obligee died, *and the executors having continued the business*, it was adjudged, that the bond did not extend so as to make the defendant who was surety liable to *them*, on *Hampton's* default, for the bond was personal *to the obligee himself.* Barker, exec. of Pyott v. Parker. T. Rep. 287. *[199]

So where the defendant had joined in a bond *to the plaintiff*, as surety for the faithful service of one *Baird* as broad-clerk *to the plaintiff;* the plaintiff afterwards took one *Delafield* into partnership, and in debt on the bond the breach was assigned in *Baird's* having embezzled money *of the partnership:* to this was a demurrer, and the action was adjudged not to lie, for the bond was for performance of faithful service *to Wright (the plaintiff) only*, not to him and his partner. Wright v. Russel. 3 Wils. 530.

These cases go on the ground of *the obligation being personal;* but where the bond was not so, as where it was made *to the house*, viz. for faithful service in *the counting-house and shop;* and the then partners in the house, to whom the obligation had been made, took in another partner; the bond was held still to remain in force; and the obligees recovered on it. Barclay v. Lucas. quot. 1 T. Rep. 292.

2. OF

2. OF DEBT BY OR AGAINST HEIR, EXECUTOR, OR ADMINISTRATOR.

Davis v. Churchman. 3 Lev. 189. Davis v. Pepys. Plowd. 439. S. P.

1. "The obligee of a bond may bring his action *either* "*against the heir or executor*:" for the obligor binds his heirs, executors and administrators; and therefore where it was brought against the heir, and he pleaded *that J. S. had administered*, the plea was held to be ill, as both were liable.

2. "In no case shall an executor be charged in debt where "the action would not lie against his testator."

Perrott v. Austen. Cro. Eliz. 232.

For where *A.* covenanted with *B.* to put his son apprentice to *C.* or that *A.*'s executors should pay to *B.* 20*l.*, the son was not put apprentice, and *A.* died: it was adjudged, that debt lay not for the 20*l.* by *B.* against *A.*'s executor; for that testator himself had never been liable. But,

N. B. The authority of this case was doubted by Lord *Mansfield. Burr.* 1893.

Archbishop of Canterbury v. House. Cowp. 140. *[200]

*If an administrator does not perform the requisitions of his administration-bond, the ordinary may authorise *a creditor or the next of kin to sue him on the bond*: for the next of kin are interested in the surplus, and a creditor in the present disposal of the intestate's effects.

Archbishop of Canterbury v. Wills. Salk. 315.

Before the statute 22 *Car.* 2. an executor or administrator was compellable to account, but the ordinary was obliged to take the account as he furnished it without examining: so was a creditor, if he sued in the ecclesiastical court, for he had a proper remedy at common law. But if a legatee had sued for an account in the ecclesiastical court, the defendant, before the statute, was obliged to prove the whole account, for the legatee had no other remedy, and the court could not otherwise exercise its jurisdiction of legacies to effect. Since the statute, a person entitled to distribution is as a statute legatee, and shall therefore have the same remedy as a legatee before the statute; and now being by the condition of his administration-bond bound to account at a day certain, he must do it without citation: but this account is not examinable unless a party interested comes in and controverts it. And the condition of the bond being that he shall administer well and truly, that shall be construed *in bringing in his account*, and not in paying the debts of his intestate: and therefore a creditor shall not take an assignment of the bond and sue it, and assign for a breach the non-payment of a debt to him or a devastavit committed by the administrator; for that would be needless and infinite.

1 Roll. Abr. 931.

4. Executors are no further chargeable than they have assets, unless they make themselves so by their own act, as pleading a false plea; *i. e.* such a plea as would be a perpetua!

nal bar to the plaintiff, and which they know to be false ; as *ne unques executor*, or a release to themselves ; but if they plead a former judgment by another person *et nil ultra*, and the plaintiff replies *fier fraudem*, and it be so found, yet judgment shall be *de bonis testatoris*.

3. OF DEBT BY OR AGAINST BARON AND FEME.

1. If a bond is given to an husband, and wife administatrix, he may bring an action on it in his own name as a bond made to himself.

Ankerstein v. Clark. 4 T. Rep. 616.

2. By the custom of *London* a *feme covert* may be a sole trader, and sue and be sued for her own debts so contracted ; but in such case she cannot give a bond and warrant *of attorney to confess a judgment : so when sued as a *feme sole*, she must be sued in the courts of the city of *London ;* for if sued in the courts above, the husband must be joined.

Read v. Jewson. Hil. 1773. Quot. per Buller. Just. 4 T. Rep. 362. *[201]

So the wife alone cannot bring an action in the courts above, but only in the courts of the city of *London :* and even where the husband was dead, and she brought an action in the court of *King's Bench* for goods sold and delivered by her while a *feme sole trader*, it was adjudged, that the action could not be maintained by her in her own name in that court.

Caudell v. Shaw. 4 T. Rep. 361.

3. If a lease be made to a woman *dum sola*, and she marries, the term expires and she dies : debt lies against the husband for rent accruing during her lifetime ; for he is chargeable by reason of the perception of the profits.

Vane v. Minshull. 1 Lev. 25.

4. Where a man previous to his marriage gave a bond to the woman he was about to marry, conditioning to pay to her a sum of money twelve months after his death ; the marriage took effect, and after his death an action being brought on the bond by the widow, the executors of the husband pleaded the marriage in bar, relying that by the intermarriage the debt was extinguished : a replication stating the above circumstances, and *that it was given in contemplation of a marriage, and as a provision for her benefit*, was on demurrer held to be good, and that the bond continued valid notwithstanding the subsequent marriage.

Milbourn v. Ewart, 5 T. Rep. 381.

4. OF DEBT BY OR AGAINST ASSIGNEES.

1. If there is a lessee for years, and he assigns all his interest to another, yet may lessor still have an action of debt against him for *rent in arrear after assignment :* first, Because the lessee shall not prevent by his own act such remedy as the lessor hath against him on his contract. 2dly, That the lessee might grant the term to a poor man who would not be able to manure the land, and so for need or malice the land would lie untilled, and the lessor be without remedy, either by distress or action of debt.

Walker's case. 3 Co. 22.

But

Marsh v. Brace. Cro. Jac. 334.

But the lessor may accept the assignee for his tenant, and so discharge the original lessee. And if *he once accepts rent from the assignee*, he can never resort back to the first lessee.

Lekeux v. Nash. 2 Stra. 1221. Pitcher v. Toovey. Salk. 81.

But the *assignee is bound to the rent no longer than while in possession*, and he may at any time assign over his term, and so discharge himself; and if even to an insolvent person, it shall discharge him: for the action as between the lessor and the assignee is founded on the privity of estate, which is gone by the assignment.

Marrow v. Turpin. Cro. Eliz. 715. Overton v. Sydhall, quot. 3 Co. 24. a.

But if a lessee for years dies, his *executor or administrator may assign the term, and shall not be chargeable for rent after the assignment*; for as they could sell the term to pay debts, so they can assign it, and be discharged from all subsequent demands of rent. And it was further held in this case, that if the lessee for years assigns over his term and dies, the executor shall not be charged for rent due after his death; for by the death, both privity of estate and contract was at an end.

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3 Co. 23. a.

2. If the *lessor grants away his reversion*, he cannot have an action of debt for the rent, for he has granted the reversion to another, to which the rent is incident. So that the grantee of the reversion alone can have the action. But if the lessor had so granted his reversion, and the *lessee had assigned his term*, the grantee should not have debt against the lessee after assignment, for there was no privity between them but by reason of the privity of estate, and that being gone by the assignment, the action will not lie.

Humble v. Glover. Cro. Eliz. 328. S. C. 3 Co. 23. b.

" And it is the same whether the person claiming the rent " comes in *by succession or by grant*."

Overton v. Syddall. Cro. Eliz. 555.

As where a prebendary made a lease, confirmed by dean and chapter, the lessee died, and his executor assigned. Afterward the prebend died, and the plaintiff being named his successor, brought debt against the executor of the lessee, and adjudged that the action would not lie, for the privity was gone by the assignment.

" But where the lessee *assigns but a part*, he is chargeable " for the whole to the grantee of the reversion, on account of " the subsisting privity."

Broom v. Hore. Cro. Eliz. 633.

For where Sir *Christopher Broom* let lands to *Hore*, rendering rent: *Hore* let to one *Wrigglesworth* one fourth part of an acre: afterward Sir *C. Broom* granted the reversion of the whole to one *George Broom* (the now plaintiff) who brought debt against *Hore* for the entire rent. It was contended for defendant, that the privity being gone as to part, was gone for the whole. But the Court held the reverse: That the entire estate remaining in one part of the land, the privity remained entire, and would support the action.

3. If

3. If the lessor in fee assigns over to another the rent of a term, and the lessee attorns, the assignee of the rent may have debt for each gale in arrear, though the reversion is in the lessor, and of course the privity of estate, for by the attornment there is a privity of contract. Robinson v. Cox and Warwick. 1 Lev. 22.

So he may devise it, and devisee may maintain an action of debt for the rent arrear. Ards v. Watkyns. Cro Eliz. 637.

4. If the lessee for years assigns all his term to another, reserving the rent to himself, he shall have an action of debt for the arrears during the term; for though not properly a rent for want of a reversion, yet it partakes of its nature, being a return for the profits which are annual. Pulteney v. Holmes. 1 Stra. 405. Raym. 99. 737. [203]

5. OF DEBT BY AND AGAINST SHERIFFS.

1. Debt lies against a sheriff, where he has returned "that *he has levied the money* under a writ of *fieri facias*," or such. But otherwise, if he returns "*that he has taken goods to such a value, which remain in his hands, pro defectu emptorum;*" for in such case he shall not be charged in debt. Speake v. Richards. Hob. 206. Hutt. 11. S. C.

So debt lies against a sheriff on his return of *having seized goods to the amount of* ——— *l. which were rescued* out of his hands. For such is no excuse to any taking on final process, as he may command the *posse comitatus*. Mildmay v. Smith. 2 Saund. 343.

And it lies in like manner against the *executors* of the sheriff, who had levied the money at the suit of the plaintiff in the action. Parkinson v. Gilford. Cro. Car. 539.

For when the sheriff has levied the debt or damages against the defendant's estate, the judgment against the defendant becomes immediately discharged, and therefore the sheriff must himself be liable. Rooke v. Wilmot. Cro. Eliz. 209.

But the plaintiff in the action may have a *scire facias*, against the sheriff, and not bring an action of debt. Smith & Linsey. Hutt. 32.

2. Debt lies against a sheriff for the *reward given by statute 6 & 7 W. and M. c. 23. on the conviction of coiners;* the judge having certified the conviction, which must be proved. Bignoll v. Rogers. Case K. B. temp. W. 3. 310.

3. Debt lies against a sheriff, where a *person in custody on final process escapes*, by the equity of stat. *West.* 2. and 1 *Rich.* 2. *c.* 14. by the party at whose suit the execution was. Bro. Ab. 19. 2 Inst. 382.

And where an action of debt is so brought against the sheriff on an escape, the *whole sum for which the defendant was in custody at the time of the escape* shall be recovered against the sheriff: and if the defendant is seen at large forever Hawkins v. Plomer & Hart, Sheriffs of Middlesex. 2 Bl. Rep. 1048.

ever so short a time after a *caption* on final process, it is an escape.

Stonehouse v. Mullins. 2 Stra. 1153.

And the action equally lies whether the escape was negligent or voluntary.

Ashborough's case. Cro. Eliz. 17.

*Or whether the writ was returned by the sheriff or not.

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Alsept v. Eyles. 2 H. Black. 108.

So debt lies against a gaoler, whether the escape be negligent or voluntary: and nothing shall be an excuse to the gaoler, except the act of God, or of the King's enemies.

For the cases on escapes at length, see *Trespass on the Case*, Chap. 13.

Jayson v. Rash. Salk. 209.

4. Debt lies at the suit of the sheriff *for his fees for executing an elegit, and other fees to which he is entitled.*

Tyson v. Pashe. Salk. 333.

And it is no objection that an elegit may not be a complete execution, for that the plaintiff may be obliged to bring an ejectment to recover the possession.

Earl v. Plumer. Salk. 332.

And if an *erroneous writ* be delivered to the sheriff, and he executes it, yet shall he have his fees, for it was the fault of the party and the sheriff has done his duty.

Alchin v. Wells. 5 T. Rep. 470.

So where the writ of *fi. fa.* was delivered to the sheriff, who levied on the defendant's goods, but after being in possession two days, the plaintiff and the defendant compromised *before the sheriff had sold*; it was held, notwithstanding that, that the sheriff was entitled to his poundage.

These fees are regulated by stat. 29 *Eliz. c.* 4. which enacts, "That no sheriff or other person shall take more for "executing any writ, extent, or execution on the body, goods "or lands of any person, than 12*d.* for every 20*s.* up to 100*l.*; "and 6*d.* for every 20*s.* after that, for the sum he shall levy "or take the body in execution for, under penalty of treble "damages to the party grieved; and 40*l.* half to the king "and half to the informer."

As to which statute it has been settled.

Woodgate v. Knatchbull. 2 T. Rep. 148.

1. Under this statute the sheriff is strictly tied down, so that he can demand nothing beyond the allowance given him by the statute, and if he takes more it is extortion, and he is subject to the penalty of it; and in such case he is bound by his return to the writ; and as to the sums he is entitled to levy *(per Justice Buller)* in judgments on actions for simple contracts, or for debt certain, *the sum given by the judgment of the court only is to be levied*, and the expense of levying, &c. is to be paid by the plaintiff in the action, not by the defendant; in which case if he overcharges or levies more, he is liable under the statute. But if the judgment is for a penalty, the plaintiff has a right to receive the whole of

of his debt, independent of the expenses of his execution. In this case the sheriff having charged poundage, and the expenses of levying on different executions, against the plaintiff, the sum of 54*l.* and that sum being found by the verdict, the Court gave judgment for treble that sum in damages.

2. That it extends only to *executions in personal actions*, not to real executions, as an *habere facias seisinam or possessionem*. 2. That on a *capias ad satisfaciendum*, the sheriff shall have his fees for the *whole debt*. 3. But in *elegit* it seems doubtful whether he shall have them for the whole sum, or only according to the sum levied. 4. The statute does not extend to executions upon *statutes merchant or recognizances*; for the act is only to be understood of cases *where the judgment redditur in invitum*, not where it is by voluntary confession of the party. Peacock v. Harris. Salk. 331. [205]

3. The statute does not extend to give costs in cases of execution out of inferior courts; so that for these the officer cannot have an action of debt. Brockwell v. Lock. Salk. 331.

4. The sheriff may have debt against the *sureties in the bond given under stat. 23 H. 6. for defendant's appearance*; and it is no objection to such bond that the surety had no lands in the county, for the bond is taken only for the sheriff's security: and the statute is silent as to the quality of the sureties, and only declares it void when not made in pursuance of the statute. Cotton v. Weale. Cro. Eliz. 862.

Having now considered the grounds of this action, before I proceed to the pleadings, it is proper to observe on *the time* at which this action may be brought.

1. If a man be bound by bond to pay a sum of money at five several days, the obligee shall not have an action of debt till all the days are past, for the contract is entire, so that the breach of it is not complete till all the days are past. Co. Litt. 292. b.

This is where the entire sum is due *on a single bond*; for if it be a bond in a penal sum, conditioned for the payment of money at different days, the condition is broken, and the bond becomes absolute upon failure of payment at any of the days, and debt lies before the last day is past. Cotes v. Howell. 1 Wils. 80. Bull. N. P. 168. S. C.

But where debt was brought on a promissory note, payable by instalments, it was held that it would not lie till the last day of payment past, though *assumpsit* might. Rudder v. Price. H. Black. 547.

But if a man be bound in a *recognizance* to pay a sum of money at five several days, presently after the first day of payment the conusee shall have execution on the recognizance for that sum, and shall not wait till the last be past; for it is in the nature of several judgments. Co. Litt. 292. b.

Broughton's case. 5 Co. 24. a. In the case of a bond of indemnity, in which the surety has paid the money, it is not necessary that he should have done it in consequence of his having been sued; for if he pays it without suit, he may then have his action against the principal.

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3. OF THE PLEADINGS.

1st, With reference to the Contract. 2dly, To the Person.

And first of the pleadings on the part of the plaintiff, considered with reference to the contract.

These are, 1st, On simple contracts. 2dly, On bonds. 3dly, For rent. 4th, On matters of record.

1. OF THE PLEADINGS FOR THE PLAINTIFF IN DEBT ON SIMPLE CONTRACT.

1. "It was formerly the law, that in debt on a simple "contract, the plaintiff was bound to declare on the contract, "*for the express sum which he was to recover* specifically, and "that he could *not recover a less sum than he declared for*; "but that strictness is now laid aside, and the plaintiff may "recover a lesser sum than in his declaration he states the "defendant to be indebted to him."

M'Quillin v. Cox. H. Bl. Rep. 249. This point was expressly ruled in this case, where the plaintiff in reciting the writ in the declaration, viz. *that defendant render to him* 500*l.*; in the several counts in his declaration the sums together made but 450*l.*; and the declaration concluded *that the defendant had not paid the said* 500*l.*; *or any part thereof*: There was a special demurrer for that cause; but the court held the declaration to be good, on the ground that the plaintiff might recover by verdict a less sum than he demanded by his writ.

Aylett v. Lowe. 2 Bl. Rep. 1221. But prior to this case the following had been decided. In debt on a *mutuatus* for 250*l.* and *nil debet* pleaded; the jury found a verdict for 100*l.* and *nil debet* as to the rest. It was moved to enter up a nonsuit, on the ground that debt being an entire thing, part of the sum could not be so recovered: but the court refused to set the nonsuit aside, and the plaintiff had judgment for the sum so given by the verdict.

Emery v. Fell. 2 T. Rep. 28. 2. In declaring in debt on simple contracts for goods sold, it is sufficient to state generally that the defendant at *Westminster*, in the county of *Middlesex*, was indebted to the plaintiff in the sum of ——*l.* for divers goods, &c. without alleging *any express contract*, or laying *any place* where the contract on the sale was made; for the words *sold and delivered*

delivered imply a contract, and the venue laid in the beginning of the declaration must imply that the contract was made there.

2. OF THE PLEADINGS IN DEBT OF BONDS.

1. "In debt on a *simple contract*, the plaintiff should set "out in his declaration *the promise or consideration* which is "the ground of his action; but in declaring on a *specialty* it "must be on a *certain writing obligatory, or deed sealed with* "*his seal*, and conclude with a profert; for the bond or ob- "ligation is of itself sufficient foundation of the action."

For where the plaintiff declared upon a *certain agreement*, sealed &c. by the defendant, and had judgment on *nil debet*, the judgment was arrested, for there was nothing in the declaration to support debt, for it could not be on promises, as no consideration was laid, nor was the agreement shewn to be *by deed*. Simons v. Alexander. Gilb. Rep. 287.

And as the bond is the sole foundation of the action, the Court must see that it is properly executed, as on it their judgment is to be founded; and therefore it is matter of substance that *profert* be made of it. And the defendant being entitled to it by law, the Court can in no case dispense with it. Thoresby v. Sparrow. 1 Wils. 16. 2 Stra. 1186. S. C.

The rule as here laid down, is the case where *the plaintiff declares with a profert*, in which case the Court will not say that the defendant shall not have *oyer*; but the Court may order that the production of a copy may be *oyer*. Totty v. Nesbitt. Trin. 24 G. 2.

So if a deed has been lost in such case the plaintiff should declare *especially*; that is, *that the deed was lost by time and accident*; for then it would appear on the record that the defendant was not entitled to *oyer*, and such mode of pleading would be good. Read v. Brookman. 3 T. Rep. 151.

And where the party is entitled to *oyer*, the party demanding it has a right to it within *two days* after demand; the day of demand, and giving it both being exclusive: therefore when oyer was demanded on *Friday*, and judgment was signed on *Monday*, the judgment was held to be irregular. Page v. Divine. 2 T. Rep. 40.

2. "In an action on a bond, the plaintiff should assign but "*a single breach*; for so only can the defendant know where "to apply his defence."

For where the defendant being appointed agent to the plaintiffs, gave the bond in question, conditioning for the payment of all sums of money by him received to the use of the company; and the breach assigned was, "That the defendant *had received from J. S. and several other persons, divers sums of money* which he had not paid to the company." African Company v. Mason. Gilb. Rep. 238. quot. 2 Burr. 773. and 1 Stra. 227.

It

It was held, that the assigning the breach in the receipt of *divers sums* from *several persons*, was too general and uncertain, and therefore badly assigned.

"But where *the transaction* upon which the breach is "founded *is entire*, though it consists of many parts, a gen- "eral assignment of a breach will be sufficient."

Cornwallis v. Savery. 2 Burr. 772.

As where in debt on a bond as security for a person appointed agent to a regiment, and the breach assigned was, "that the defendant had received several sums of money from the paymaster-general, for the use of the regiment, which he had not paid over to the officers according to their respective proportions." This breach was on demurrer held to be well assigned, for the money was received from one person (not from many, as in the last case) and for one purpose, to pay the regiment; and his omitting to pay *any part* of it was a breach of the bond and sufficient.

"And where a single breach is assigned, it should be ful- "ly and particularly stated *in what manner the breach accrued.*"

Jones v. Williams. Dougl. 20 g.

As where in debt on a bond conditioning for security for the faithful service of a clerk and breach assigned, "That a large sum of money, *viz.* 13*l.* came to the clerk's hands on account of the plaintiff, which he (the clerk) had spent and embezzled." This breach was held to be ill assigned, for not shewing *how and from whom the money so embezzled had been received.*"

S. "The breach should always be so assigned that by no "presumption it shall be out of the condition of the bond; "for so judgment might be given without cause of action."

Stibbs v. Clough. 1 Stra 227.

As where in debt on a bond which conditioned, "That the plaintiff should furnish the defendant with ale and beer, to be used in his house at such prices, and that he should take it of nobody else; but might take his other liquors from whom he pleased (malt liquors only excepted." In debt on the bond the breach assigned was, "that such a quantity of *liquors* was drawn and unpaid for." On demurrer, the breach was held to be ill assigned, for it did not appear that the liquors unpaid for were *malt liquors*, which only the defendant was bound to take from the plaintiff.

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"But the assignment of the breach need not be *in the* "*words of the condition*, if it appears to be within the inten- "tion or spirit of the agreement."

Bache v. Proctor. Doug. 367.

For where the condition of a bond was, "That the defendant should from time to time *render a just and true account*

count of all monies received by him as treasurer of the parish of *B*, &c." and the breach assigned was, that on the last account furnished by the defendant, there appeared to be due by him a large sum of money which he had not *paid over*: The defendant demurred for cause that the breach was not within the condition which was only to *account*: but *per curiam*, the intention of the parties, and fair construction of the condition is, that the money should be paid; for to construe it a condition to enforce the making out a paper of *items* and figures is idle and nugatory.

4. "Where the plaintiff brings debt on a bond for perfor-
"mance of any thing, if the defendant pleads matter of ex-
"cuse, the plaintiff need not set out a particular breach, for
"the excuse admits the non-performance and justifies it."

As in debt on a bottomry bond, the defendant craved oyer, and the condition was, "That if such a ship returned in ten weeks, and gave an account of the profits of her voyage, that then the obligation should be void." The defendant pleaded, that the *ship was lost*, and did not return: The plaintiff replied, that the ship was not lost, and the defendant demurred for cause that there was no breach assigned; but it was adjudged, that the defendant had made it unnecessary by pleading matter of excuse. Meredyth v. Alleyn. Salk. 138.

The only exception to this is, the case of an *award*; for in debt on a bond to perform an award, if defendant pleads matter to excuse the non-performance, the plaintiff must *set out the award and the breach*, for the award may be void in the whole or in part, and therefore the award must be set forth, not only that the court may see that there was an award, but also that the non-performance was of a good and not of a void part of the award, for that need not be performed. Per. Holt. S. C.

5. "Where a bond is in the *disjunctive*, a breach of either [210]
"part by the act of the obligor forfeits the bond, and is a suf-
"ficient assignment of the breach; for the law will supply
"those words *which shall first happen*." (1 *Lev.* 54.)

As where the defendant's wife, when sole, gave a bond to the plaintiff, which was in a penalty of 1200*l.* if she married *any other person*, than the plaintiff, *or* refused to marry him within one month after the death of her father. Having married the defendant in the lifetime of her father, the plaintiff brought debt on the bond, assigning her marriage as a breach; and it was held to be good (though insisted, that she might still perform one part of the condition by marrying the plaintiff after her father's death, as he might survive her husband:) for that, by the breach of one of the conditions, the bond became absolute. Box v. Day & Ux. 1 Wils. 59.

6. Where

Hallet v. Hodges. Sayer's Rep. 29.

6. Where the bond was for the payment of a sum of money by instalments, *viz.* 150*l.* by 50*l.* on the 1st of *November*, 50*l.* on the 30th of *May*, and 50*l.* on the 30th of *October*; the condition was for the payment of these sums, without the words *or any of them*: It was nevertheless resolved, that the obligee might on default of payment of any of the instalments bring his action against the obligor.

Vide Judd v. Evans. 6 T. Rep. 339.

Dutch West India Company v. Jacob Senior Henriques Van Moses. 1 Stra. 612.

7. Debt is in its nature a transitory action, and a bond or other obligation entered into in any foreign country may be sued for in *England*. But in such case, if dated at a certain place, the declaration should set it out as made at the true place, with a "*viz.* at *London*, in the Ward of *Cheap*," or where he means to try it.

Roberts v. Harnage. Salk. 659.

Therefore where the plaintiff declared, "that the defendant by his bond *apud London concessit seteneri*, &c. to the plaintiff in 40*l.*;" and on oyer the bond appeared to be dated at *Port St. Davids* in the *East Indies*, which was not mentioned in the declaration, the variance was adjudged to be fatal.

And the reason of these cases seems to be, that where there is an omission of the date or place where made, the bond produced in evidence does not appear to be the same declared on: for a bond made in *London* is not presumable to be the same with one made at *Port St. David's*, and therefore the variance between the proof and declaration must be fatal, it being the constant practice to compare the declaration with the bond produced at the trial. *Bull. N. P.* 169.

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"But if the deed produced is in *substance the same* with "that declared on, if the declaration states matter of *surplus-*"*age* or *no way variant of the deed*, it shall not vitiate.

Holman v. Borough. Salk. 658.

As where the plaintiff declared on a deed of covenant, dated the 30th of *March*, 1701, *annoq.* 13 *regn. Gul.* 3. And on oyer those latter words were wanting: on demurrer for variance, the Court held it to be none, for the deed was implicitly the same.

Roberts v. Harnage. Salk. 656.

And in this case before, where the plaintiff declared on the bond *solvendum to the plaintiff*, and on oyer it appeared to be *teneri* to the plaintiff for 40*l. to pay to his attorney or assigns*, it was adjudged to be no variance, for payment to the plaintiff or to his attorney is the same thing; the *teneri* made it a debt to the plaintiff, and a *solvendum* to any one else would be repugnant.

8. "Where a person becomes surety for another in a bond, "if the principal does not pay the money at the day, the sure-"ty may, and recover against the principal, though the pay-"ment was without suit."

Broughton's case. 5 Co. 24, a.

For where in debt on a bond of indemnity, the condition of which was, "that the defendant should save the plaintiff harmless

harmless from all suits, quarrels and demands, concerning a certain bond, in which the plaintiff was bound for the defendant for payment of 100*l.* to *A. B.*" On *non damnificatus* pleaded the case was, that the plaintiff on the day of payment came to the place where the 100*l.* was to have been paid, and finding no person there to pay it, he paid the 100*l.* to save the penalty of his bond to *A. B.*, and now brought his action on the bond of indemnity, and adjudged that the plaintiff should recover; for the payment of the 100*l.* was a damage, and it was not necessary that the plaintiff should be sued or arrested; and it was there said to have been resolved, that terror of suit, so that a man cannot go about his business, is a damnification, although he be not arrested by force of process.

9. "This action being transitory, the court will never "change the venue, except under particular circumstances." Duplessis v. Chalk. 2 Stra. 878.

As where the party's witnesses are in a distant county, and then the court will annex conditions to the changing the venue, as undertaking not to bring a writ of error, or giving judgment of the preceding term. Foster v. Taylor. 1 T. Rep. 781.

And *Note*, That the breach being set out in the declaration, the plaintiff can only allege new matter in the specialty declared on, in his replication, *after setting it out on oyer:* and therefore where the plaintiff declared, on articles whereby the defendant agreed to take his *malt liquors* only from him, the defendant pleaded performance, and the replication, "That by the same articles it was further agreed, that what should be drawn should be paid for:" and that such a quantity was drawn, was held to be bad. Plen. in Stibbs v. Clough. 1 Stra. 227.

3. OF THE PLEADINGS FOR THE PLAINTIFF IN DEBT FOR RENT.

1. In declaring on a *lease at will* for rent arrear, the plaintiff must not only set out a demise, but also aver and prove the *entry and occupation* of the lessee: for the rent is only due in respect of the occupation, and therefore it must appear to the court when the lessee entered, and how long he occupied: but in debt for rent on *a lease for years*, though it is usual in the declaration to say "*virtute cujus, lessee entered,*" yet it is not necessary to set out such entry and occupation; for the action is grounded on the lease, and though the lessee neither enters nor occupies, yet he must pay the rent. Bellasis v. Burbrick. Salk. 209. [212]

But the want of setting out the occupation on a demise at will, must be shewed for cause of special demurrer, for it will be cured by a verdict.

2. If rent is reserved quarterly or half-yearly, each gale is a distinct debt for which the lessor may have his action, and may Welbie v. Phillips. 2 Vern. 129.

may declare for an entire gale at the end of any quarter or half year without shewing how the former quarter or half-year has been satisfied : but if he declares only for *part of the gale* due at the end of any half year or quarter, it is bad, *unless he shews how the remaining part was satisfied:* for otherwise the lessee may be exposed to many actions for the same demand.

Piltarfe v. Darby. Show. 8.

And whenever rent or any other duty is received quarterly or half-yearly, the declaration should always state *when it was due and ending*, or it will be bad.

Hulm v. Saunders. 2 Lev. 4.

So if rent is reserved *annually*, to say after *by even portions*, is idle and vain, and no action will lie for an *half year's rent*. And if the plaintiff declares for less rent than a year, without shewing how the rest was satisfied, it is bad, as in the case of *Welbie* v. *Phillips*, *supra*.

3. "Where the plaintiff in his declaration undertakes to "recite a lease or demise, any misrecital is fatal, if the ac-"tion is founded on such lease or demise."

Sands & Tash. v. Ledger. 2 Lord. Raym. 792.

In debt for rent, the plaintiff declared on a demise, "for 15*l. per ann.* rent, under a power to make leases for twenty-one years." And on evidence, it appeared to be a demise for 15*l. per ann.* rent, and *three fowls*, under a power to make leases for twenty-one years *in possession and not in reversion, rendering the ancient rent and not disputnishable of waste :* for this variance the plaintiff was nonsuited.

Shute v. Hornsey, quot. Dougl. 643.

So where the plaintiff declared on a lease *for three years*, and on evidence it appeared that the lease for three years was void under the statute of frauds, and that the defendant was only tenant from year to year : the lease for three years being laid and not proved, the plaintiff was nonsuited. *Vide Plen. Cas. Bristow* v. *Wright*, *Doug.* 640.

Patterson v. Scott. 2 Str. 776.

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4. If the action is for rent *against* the *original lessee*, the *venue* may be laid either where the *land lies* or *where the deed was executed*. But if the action is against the *assignee of the lessee*, it must be laid where the land lies ; for he is chargeable only on the privity of estate.

Way v. Yally. 2 Salk. 651.

Therefore where the lessor brought debt for rent against his lessee on a demise of lands in *Jamaica*, made in *London*, and the defendant pleaded to the jurisdiction of the court, that the matter ought to be tried in *Jamaica*, where the lands lay ; but the court held, that there was a privity of contract, which is transitory, and so need not be tried where the lands lay.

Comel v. Lissit. 2 Lev. 60.

So against the executor of the lessee, the action must be brought where the land lies, for he is chargeable as assignee on the privity of estate only.

So

So debt for rent *by* the assignee for the lessor against the lessee, must be brought where the lands lie, though it is otherwise in the case of covenant, which is transitory. Thrale v. Cornwall. 1 Wils. 165.

4. OF THE PLEADINGS FOR THE PLAINTIFF IN DEBT ON MATTERS OF RECORD.

1. In declaring on a *bail bond as assignee of the sheriff*, the plaintiff need not set out, "That the debt sworn to was above 10*l.*, and that for which the defendant was held to bail, was the sum marked on the writ according to statute 12 *Geo.* 1." For the statute does not declare the proceedings void, but only prohibits the sheriff from taking greater bail than for the sum so marked on the writ: and if the sheriff acts otherwise, he is liable to an action at the suit of the defendant, or the defendant may be discharged on common bail; but the bail bond is still good. Whiskard v. Wilder. 1 Burr. 330.

2. Neither is it necessary in declaring as assignee of the sheriff, to state the assignment to have been made "in the presence of two credible witnesses" in the words of the statute, and mentioning their names; nor is any profert of the assignment necessary, for it is not a deed. Lease v. Box. 1 Wils. 180.

3. "In declaring for an *amercement in a court leet*, the "plaintiff should state truly the manner in which the amerce-"ment was made, and that it was legally imposed; for be-"ing a penalty, the law is always strictly construed."

Therefore where in debt for an amercement in a court leet, the declaration stated the amercement to have been affeered at a court holden *before the steward* of the manor; but it appeared in evidence, that the court was really held before *the deputy steward*: for this variance the plaintiff was nonsuited, and the court on application refused to set it aside. Wyvill v. Shepherd. H. Bl. Rep. 162. [214]

So in debt on an amercement the declaration stated that the defendant was summoned to serve on a jury of the court leet *and court baron*: but the summons was to serve on a jury of the *court leet only*. Lord *Mansfield* said, this was a case of strict law, it being an action for a penalty; that the plaintiff having stated in his declaration, that the defendant was summoned to a jury of the court leet and court baron, was bound to prove that averment, which the summons not having proved, he must be nonsuited. Gery v. Wheatley. Sitt. Mich. 1777.

In declaring in debt for *an amercement in a court leet*, the declaration ought to state that the defendant was an *inhabitant within the leet*, as well at the time of the amercement as of the offence: but this would be cured by a verdict, as it must be proved at the trial. Wicker v. Norris. 8 G. 2. Bull. N. P. 167.

4. "Where a matter of record is the ground of foun-"dation of the plaintiff's suit, there it ought to be certainly Co. Litt. 303. a.

" and truly alleged ; but otherwise where it is but induce-
" ment or conveyance."

Waites v. Briggs. Salk. 565.

Therefore in debt on an *escape*, the plaintiff having declared that the prisoner was committed and escaped, and because he did not say *prout patet per recordum*, the defendant demurred generally ; but the plaintiff had judgment, for the gist of the action was the escape, and the commitment only inducement.

And *per Holt* in this case, in debt on a judgment, *quod cum recuperasset* is good without a *prout patet per recordum ;* and the defendant may plead *nul tiel record*. So that it seems not necessary to aver a record *in the very words*, as words tantamount, as *quod cum recuperasset* are sufficient.

" As therefore in declaring on matter of record, where it
" is the gist of the action, it ought to be certainly and truly
" averred, any variance shall be fatal."

Rastall v. Strat on. H. Bl. Rep. 49.

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As where in debt on a judgment the plaintiff in his declaration stated, that in *Trinity* term, 1787, he had recovered by a judgment of the court of K. B. 42*l*. for his costs, in the defence of an action, brought by the defendant in that court against *him the said plaintiff ;* on *nul tiel record* being pleaded, and the record being produced, it appeared that the judgment was of *Easter* term, 1788, and the action to have been brought by the defendant against the plaintiff *and another person ;* both of which variances were by the court adjudged to be fatal.

Cherley v. Wood. Salk. 659.

So where the plaintiff declared on a recognizance, acknowledged *in the court of Common Pleas*, before the Chief Justice, and *socii ejus*, and upon *nul tiel record* pleaded, the recognizance produced appeared to have been taken before one of the *puisne judges at his chambers*, and by him brought in, and delivered into court ; the plaintiff was adjudged to have failed in his record ; for the record as entered on the roll and produced, was in fact as it was taken. But in such case there is a difference in the practice of the *King's Bench*, and *Common Pleas*, for the *King's Bench* enters all recognizances as taken in court, so that they bind only from the time of being entered there. But the *Common Pleas* enters them specially as taken, so that they bind from the caption. And further, upon a recognizance in K. B. a *scire facias* lies only in *Middlesex* ; but on a recognizance out of C. B. it lies either in *Middlesex* or in the county where taken, and so the *venue* must be laid in an action of debt, either in *Middlesex* alone, if the recognizance was in K. B. but in *Middlesex*, or where taken if of the *Common Pleas*.

S. C. called Shuttle v. Wood. Salk. 654.

Hull v. Winchfield. Hob. 196.

5. If the plaintiff declares in debt on a judgment, he must lay his *venue* where the judgment was obtained, as if the

the plaintiff had judgment on debt or trespass at *Norwich*, he must lay his action on that judgment at *Norwich*, and not in *Middlesex*; for the original debt or trespass is not now the ground of the action, but the record of that judgment which has created a new debt, and is local.

And *Note*, in general, That in declaring upon *bonds or matters of record*, the declaration should always conclude with an *ad damnum* of the plaintiff; but in *debt for rent*, with a *per quod actio accrevit*. For in the first case the debt arises merely from the bond of judgment; but in the latter from something extrinsic, viz. the enjoyment of the land.

6. And as before in debt upon leases, the declaration on the *judgment* must be for the whole or shew how the rest was satisfied, or the declaration will be ill. Marsh v. Littler. 2 Mod. 41.

2dly, OF THE PLEADINGS ON THE PART OF THE PLAINTIFF, CONSIDERED WITH REFERENCE TO THE PERSON. [216]

These are, 1st, Against the Party himself or his Heir. 2dly, By or against Executors and Administrators. 3dly, By or against Baron and Feme. 4thly, By or against Assignees.

1. OF THE PLEADINGS AGAINST THE PARTY HIMSELF OR HIS HEIR.

1. The declaration against the *contracting party himself* in all cases of debt, must be in the *debet et detinet*; for he is a debtor by the contract, and does a wrong by withholding what is due. F. N. B. 119.

2. In the case of *bonds, or where the ancestor* (the original debtor) *binds his heirs*, &c. the declaration against the heir must also be in the *debet et detinet*: for as he is chargeable *jure suo* by virtue of the original contract from having assets descended to him, he shall be charged as for his own debt. Goodwin v. Newton. 1 Lev. 130. Plowd. 140.

"But as the heir is chargeable by reason of assets descended, he can discharge himself by shewing *that he had no assets by descent*; but he must shew this specialty or he will be bound."

For where in debt against an heir on an obligation made by his ancestor, he let judgment go by default, and a *ca. sa.* issued against him, he brought error and assigned, that the execution should have issued against the *lands* descended only, and not against his person: but it was adjudged, that the judgment should be general as his own debt, unless where he acknowledges the action, and shews that he had so much only by descent. Barker v. Bourn. Cro. Eliz. 69.

"And

"And where the declaration is against the heir on the "ground of assets, it must state him as *lineal or collateral heir* "according as he is."

Jenk's case. Cro. Car. 151.

For where in debt on a bond against the defendant, as *brother and heir of J. S. the obligor*, upon *riens per discent*, in issue, it was proved, that *J. S.* was seized in fee and died seized, *leaving issue a son*, who died without issue, upon which the lands descended to the defendant as *heir to the son*; the Court held that the verdict was found for the defendant; for he had nothing *as immediate heir to the obligor J. S.* : and if the plaintiff would charge him as collateral heir, he ought to have made a special declaration.

Kellow v. Rowden. Show. 244. 3 Lev. 286. *[217]

*But where *A.* settled an estate upon himself for life, remainder to his eldest son in tail, remainder to his own right heirs, and entered into a bond and died, leaving two sons, *B.* the elder and the defendant; *B.* entered and died, leaving issue a son, who also entered, died without issue, and then the defendant entered: it was held that he might be charged as heir to *A.* for he *took nothing from the nephew*, but took as heir to him to whom the reversion in fee was assets.

Denham v. Stephenson. Salk. 554.

But in debt against an heir, *by an executor or administrator*, on a bond of his ancestor, the declaration need not shew how he is heir, for the plaintiff being a stranger, it would be hard to compel him to set out another's pedigree: but where the plaintiff *sues* as heir, he must set out his pedigree, for it is within his own knowledge.

Comber v. Wotton. 1 Lev. 224.

But though the declaration against the heir should be in the *debet et detinet*, yet if it be in the *detinet* only it will be cured by a verdict.

2. OF THE PLEADINGS BY AND AGAINST EXECUTORS AND ADMINISTRATORS.

1 Roll. Abr. 603.

1. "If the declaration is against an executor or adminis- "trator, it must be in the *detinet only*, for he is not personal- "ly liable, but only in respect of the testator's estate; he "therefore cannot be said to *owe*."

Hargrave's case, 5 Co 31. Vide Salter v. Cobbold. 3 Lev. 74.

It is held however in this case, that if debt is brought against an executor *for rent due in his own time*, that it must be in the *debet et detinet*. But in the report of the same case in *Cro. Eliz.* 711, I find that decision was reversed in the Exchequer Chamber.

Wheatley v. Lane 1 Saund. 216. 1 Lev. 255. S. C.

However, *after a judgment* obtained *against an executor*, one may have debt in the *debet et detinet suggesting a devastavit*, and thereby charge him *de bonis propriis*; for being so liable to pay out of his own effects, it is properly his own debt.

2. In

2. In debt on a *judgment* against an executor *suggesting a devastavit*, the action may be laid either in *Middlesex*, where the judgment is entered, or *in the county where the devastavit is laid to be*: but if the defendant admits the judgment, but traverses the wasting, that issue must be tried in the proper county. King v. Burrell. Mich. 3 Geo. 2. C. B. Bull. N. P. 178.

And *Note*, That an administrator may be declared against as *assignee*, in debt for rent, for the time that he enjoyed the land, and was in possession. Buck v. Barnard. Show. 348.

*3. An *executor* may bring an action before probate, but he cannot *declare* till probate granted, for when he comes to declare he must produce his letters testamentary: but an *administrator* cannot bring an action *till administration granted*, for the power of the first is derived from the will, that of the latter from the ordinary. 9 Ed. 4. 47. 1 Roll. Abr. 917. A. 2. Salk. 302. *[218]

But if the probate has been lost, an exemplification from the ordinary will be sufficient. Shepherd v. Shorthose. 1 Stra. 440.

3. Declarations by executors or administrators must be in the *detinet* only; for a person can only be said to owe to the person to whom the money when received would belong, that is, to the *testator's or intestate's estate*, not to his executor or administrator. Frewin v. Penton. 1 Lev. 250.

"And this is the case whether the action is founded on a "contract or tort."

As where it was in debt *for an escape against the sheriffs*, on a judgment obtained by the executors: the declaration, it was adjudged, should be in the *detinet*. Hitchcock v. Skinner & Lacy, Sheriffs. Cro. Eliz. 327. 1 Roll. Ab. 602.

So where the action was debt *for rent*, it was resolved that the declaration must be in the *detinet*; though the rent in this case was on a demise which commenced on the death of the testator, so that he never received any rent. Spark v. Spark. Cro. Eliz. 840.

"But where the executor *makes himself chargeable to the "testator's estate*, there the declaration shall be in the *debet et "detinet*."

As if he sells the goods of his testator, and brings debt for the money: so if he takes a bond for a debt due to his testator; but if where the debt was due by bond to the testator he takes a fresh bond, but with an additional obligor and payable at the same time, this should be in the *detinet* only: for in such case he is not chargeable on his own account, as in the two preceding cases. 1 Roll. Abr. 602.

4. In actions by an executor, the declaration should state "*That the testator was dead, and he complete executor.*" But if the executor has recovered and had judgment, and afterward brings a *scire facias* on it, such averment is not necessary, Morfoot v. Chivers. 1 Stra. 631.

essary, though it would be otherwise had the *scire facias* been on a judgment obtained by the testator himself; for by the first judgment the executor's right was established: but where the first judgment has been by the testator, [219] the executor's right does not appear without such averment.

Skidmore v. Winston. Cro. Eliz. 879.

5. So a declaration by an administrator is good, stating in general, *That administration was granted to him by the bishop of, &c.* without saying that he was ordinary, or to whom the right of granting administration belonged: but if it is a peculiar jurisdiction, that should be so set out. And the reason is, that the defendant might contest the right of the person granting administration, or shew that administration was granted to another, or that there were *bona notabilia*: but a verdict would cure the fault.

Gradell v. Tyson. 2 Stra. 716.

6. In a declaration by an *executor of an executor*, he should set out, "*That the first executor provided the will*;" for otherwise the plaintiff has no title: for if there had been no probate granted to the first executor, an *administration cum testamento annexo* should be granted of the effects of the first testator to the next of kin: but this would be cured by a verdict.

Hooker v. Quilter. 2 Stra. 1271. 1 Wils. 171. S.C.

7. An executor should not join in the same declaration a demand by his testator, and in his own right, or the writ will abate; for the judgments would be different: that on the first would be *de bonis testatoris*, that on the latter *de bonis propriis*.

4. OF THE PLEADINGS BY AND AGAINST BARON AND FEME.

Walcot's case. 5 Co. 36. a.

1. *For a debt due by the wife dum sola*, as on a bond made by her before marriage, the declaration must be *against husband and wife in the debet et detinet*: for as by the intermarriage all the chattels of the wife belong to the husband absolutely, he is chargeable on that account with all her debts.

Cro. Eliz. 133. Howell v. Main. 3 Lev. 403.

2. For personal things in action, as *a bond to the wife dum sola*, the *husband* may bring the action *alone*, or join the wife, as he thinks fit.

Humfreys v. Vaughan. Show. 13.

And *Note*. That though the *wife is under age*, yet the husband and wife may bring this action, and appear by attorney: for the husband by law may make an attorney, and appear both for himself and his wife.

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5. OF THE PLEADINGS BY OR AGAINST ASSIGNEES.

1. "If the action is brought by the assignee of the reversion against the lessee for rent, he must set forth the "seisin

"seisin in fee in the first tenant, and the several mesne assignments down to himself: for these are necessary to "make out his title, and the validity of these assignments "being matter of law, ought to be set forth for the court to "judge of."

For it is a general rule, that estates in fee-simple may be alleged generally, but the commencement of estates tail, and other particular estates, must be shewn *where they go to the ground of the action*; but not so where they are *only inducement*. And so the life of the tenant of tail or for life ought to be averred. Co. Litt. 303.

2. But where the action is by the lessor or his heir, *against the assignee of the lessee*, the plaintiff need not set out the several mesne assignments to the defendant, for they do not lie within his knowledge: but it is sufficient for the plaintiff to set forth the original demise to the first lessee, whose estate and interest has by several mesne assignments come to the defendant; and proof of possession and occupation shall be sufficient to charge him. Cotes v. Wade. 1 Lev. 190. Pitt v. Russell. 3 Lev. 19. S. P.

2dly, OF THE PLEADINGS ON THE PART OF THE DEFENDANT.

With reference to the contract, and with reference to the person.

1st, As to Bonds. 2dly, As to Rent. 3dly, As to Judgments. 1st, The Pleas applicable to each. 2dly, Such as are applicable to all.

I. OF THE PLEAS AS TO BONDS, WITH REFERENCE TO THE CONTRACT.

These are, 1st, Pleas to Bonds in general. 2d, Non est factum. 3d, Nil debet. 4th, Solvit ad diem. 5th, Accord and Satisfaction. 6th, Foreign Attachment. 7th, Pleas to Bonds of Indemnity.

1. Of Pleas to Bonds in general. [221]

1. "As to which it is a rule, that no *parol averment* vary-"ing the condition of a bond, shall be admitted as a plea."

As where to debt on a bond, the defendant pleaded, "That before the day of payment in consideration of a trespass done to him by the plaintiff's beasts, that the plaintiff *had given to him a longer day for payment, which was not yet come.*" On demurrer the court held the plea ill, for no agreement by parol can dispense with an obligation. Hayford v. Andrews. Cro. Eliz. 697.

So

Whyddon's case. Cro. Eliz. 520. Holford v. Parker. Hob. 246.

So if the bond is delivered *to the obligee himself*, the obligor cannot plead "that the delivery was not absolute, but conditional;" for that would be variant from what appears on the face of the bond, which is absolute.

Mease v. Mease. Cowp. 47.

So where to debt on a bond conditioned for payment at a day certain the defendant pleaded, "That the bond was not absolute, but given to indemnify the plaintiff's testator against another bond, and *non-damnific*:" on demurrer the plea was held to be bad, for it was giving parol evidence to abate a deed.

Bro. faits. 10. Dr. and Stud. ch. 10.

"But when the obligor has entered into a bond for payment of money absolutely, he may yet be discharged "by a subsequent *instrument in writing*."

Hodges v. Smith. Cro. Eliz. 623.

As where to debt on a bond, the defendant pleaded, "That after the obligation, the plaintiff *by his indenture covenanted*, that upon payment of 100*l.* that the first obligation should be void:" it was demurred for cause that the indenture being made after the bond, it could not be pleaded in bar thereof, but should be taken advantage of by covenant and that it should not enure by way of defeasance or release: but the Court held it well pleaded in bar, and that circuity of action was to be avoided.

"But in such case, it seems that such instrument should "appear to be *intended to operate as a defeasance of the first obligation*, as to say, "that on payment," &c. the first obligation should be void."

Manhood v. Crick. Cro. Eliz. 716.

For where there are no such words, it was held that a bond given at a subsequent day could never be pleaded in bar to one given before.

Cro. Eliz. 520. Co Litt. 65. a. *[222]

*"But where the bond has not been delivered to the obligee "himself, but *to a stranger*, there the defendant may plead "any parol matter, as that it was delivered conditionally, or "as an escrow: for *delivery* is one of the essentials to a deed, "and it is not good and recoverable unless it has been delivered *to the obligee himself*; without which it is no deed."

Anon. 1 Vent. 9. Ward v. Forth. 2 Vent. 10.

And therefore where the defendant so pleads the delivery as an escrow, he should shew *to whom* he so delivered it, and conclude *& issint nient son fait*, as such conclusion is good according as the delivery has been to the obligee himself or to a stranger. And so where the defendant only pleaded a delivery to *T. S.* "*et hoc parat. est verificare*," the plea was held to be bad: for it is a special *non est factum*, and so should have concluded to the country.

Watts v. Rosewell. 1 Salk. 274.

For where the defendant pleads delivery as an escrow, and *sic non est factum*, the plea should conclude to the country, and not with an averment; for it is a special negative of the affirmative

affirmative in the declaration, and the general conclusion (*sic non est factum*) waives the special matter precedent, which would have made an averment necessary.

" In one instance, modern practice has admitted an ex-
" ception to the rules now laid down, that is, in the case of
" *Trusts.*"

For the courts of law now take notice of Trusts, and will allow a plea not consistent with the bond. As that the plaintiff, the nominal obligee in the bond, is not the real owner of it, *but merely a trustee for another.*

Rudge v. Birch. Mic. 25 G. 3. 1 T. Rep. 622.

Therefore where a *bankrupt* had assigned his interest in a debt, by a deed-poll to a third person, *he* was notwithstanding allowed to bring his action for the benefit of the person to whom he had made the assignment, and recovered; for the statute 1 *Jac.* 1. *c.* 15. only gives to the assignees such things in which the banks has a *beneficial interest*, which in this case he had not, being merely a trustee for another.

Winch v. Keeley Hil. 27 Geo. 3. 1 T. Rep. 619.

So that the point seems now to be settled. The first case in which it occurred was this: To debt on a bond, the defendant pleaded, " That the bond was given to the plaintiff for securing 100*l.* lent to the defendant by one *E. Chancellor*, and was by her direction made to the plaintiff in trust for her, and that *E. Chancellor* was now indebted to the defendant in more than the amount of the bond." To this was a demurrer; but it was withdrawn by advice of the Court.

Bottomley v. Brook. Mic 22 Geo 3. C. B 1 T. Rep. 621.

2. " But though the defendant is estopped to plead any " matter contrary to the bond, yet he may plead a plea, " which admitting the bond, yet shall avoid it, as *that the* " *consideration was illegal. ex. gr.*" [223]

For where in this case it was attempted to be supported, that the defendant was estopped by his deed to plead any thing *dehors* to avoid it, (as here, " That it was given to compound a prosecution for perjury,") the Court held, that the estoppel only went to prevent the party from pleading any thing *contrary to the deed*; but this plea admitted and avoided it. And in this case the plea should conclude, " that therefore the bond was void," not with a *non est factum.*

Collins v. Blantern. 2 Wils. 344.

2. Of the Plea of non est Factum.

This is to be pleaded under these limitations:

1. If the bond be void in itself, but that does *not appear on the face of the deed*, but depends on something extrinsic *(as if made by an infant or person non compos)*; in that case *non est factum* is a bad plea. For the Court can only judge from

Thompson v. Leach. Salk. 675.

what is before them, and the bond on the face of it appears to be good. Such also is the case of *duress*, which must be pleaded.

Whelpdale's case. 5 Co. 119.

2. So where a bond or other instrument is *by an act of parliament enacted to be void*, the obligor cannot plead *non est factum*; but the special matter should be pleaded, and advantage taken of the statute. And if the bond was given on an *usurious consideration*, the statute must be pleaded.

Lord Bernard v. Saul. 1 Stra. 498.

Colborne v. Stockdale. 1 Stra. 494.

So if the bond was given for *a gaming debt*, the statute should be pleaded. And in this case the defendant in his plea should set out the game played at, and conclude *contra form. stat.* that the Court may see that it was within the statute. So in pleading simony, the agreement must be shewn.

Whelpdale's case. 5 Co. 120.

3. But if a bond never was complete by delivery, as if delivered to another to the use of the obligee, and being tendered, he has refused it whereby the delivery has lost its force; or if made to a *feme covert*, and the husband has disagreed to it; in these cases the obligor (defendant) *may plead *non est factum*. So though it was once his deed, yet, if before action brought, it becomes no deed, either by rasure, interlineation, alteration, or breaking off the seal; in these cases the defendant may plead *non est factum*.

Markham v. Gonaston. Cro. Eliz. 626.

*[224]

Michael v. Scockwith. Cro. Eliz. 120.

For this plea of *non est factum* is in the present tense, and therefore if true at the time, the plaintiff (the obligee) cannot recover, but if the deed was good when the plea was pleaded, but after issue joined the seal was pulled off, or the deed cancelled, yet shall the plaintiff recover.

Henry Pigot's case. 11 Co. 26.

And *Note*, That though rasure in general shall avoid a deed, if made by the obligee, or a *stranger*, without his privity, in *a part material*, or by himself, in a part not material; yet an alteration by a stranger *in an immaterial part* will not avoid a bond, if done without the privity of the obligee.

4. "From these cases it appears that on the plea of *non* "*est factum*, questions of fact only arise, as the non-deliv- "ery, *rasure*, &c."

Colton v. Goodridge. 2 Bl. Rep. 1108.

But where the condition is void in law, the defendant in such case should not plead *non est factum*, but pray over and demur, if the illegal condition appears on the face of it: if not, plead the special matter to avoid it.

Ball v. Dunster, & al. 4 T. Rep. 313.

5. Though a deed should regularly be executed by the party, against whom an action is brought either in his own person, or under a power of attorney; yet where one of the defendants, *in the presence of the other and by his authority*, executed the instrument for both, they being partners in the transaction, the Court were clearly of opinion, that no

no particular mode of delivery was necessary; but that it was sufficient if the party executing a deed treated it as his own, particularly, as in this case it was executed in his presence.

3. Of the Plea of Nil Debet.

Nil debet cannot be pleaded to debt on a bond. This was so held on general demurrer; for the bond acknowledges a debt, and so there is an estoppel. Anon. 2 Wils. 10.

4. Of the Plea of Solvit ad Diem.

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1. "It was formerly the case in debt on a bond, that as "the money was to be paid according to the condition at a "*day certain*, if the money was not paid *at the day*, that the "bond was forfeit, nor could the defendant under this issue "*prove payment after the day*: But it is now enacted by sta- "tute 4 & 5 *Ann. c.* 16. *s.* 12. "That where debt is brought "on any single bill, bond, or judgment, if the money has "been paid, though neither at the day or place, yet if paid "at a subsequent day, such payment may be specially pleaded."

But if the defendant has paid the money before the day, he may, to debt on a bond conditioned *to pay at a day certain*, plead *solvit ad diem*, and give in evidence payment before the day, as he could not plead it; for if the defendant was to plead payment before the day, the issue would be immaterial, for it still left the presumption open that there might be payment at the day. And therefore a difference is to be observed between pleading where the condition of the bond is to pay *at a day certain*, and where *at or before* such a day: for to the first the defendant may only plead *payment at the day*, for the reason now given; and beside, that the performance of a condition ought to follow the terms of it; but to a bond payable *at or before such a day*, the defendant may plead *payment before the day*, viz. *on such a day*, for it is within the condition. And therefore where it was so pleaded, and the defendant demurred to it as an immaterial issue, the Court over-ruled the demurrer, and laid down the rule to be, "That "where the defendant pleads performance of the condition, "the plaintiff must assign an absolute breach, though it is "not necessary where he pleads a collateral matter (as a re- "lease;) and that therefore where the defendant had pleaded "payment before the day, the plaintiff should have replied, "That the money was not paid at the day mentioned in the "plea, *nor at any time before, on, or after that day*." For by such issue alone can the payment be tried. Winch. v. Pardon. Mich. 1 G. 1. Buller N. P. 174. Tryon v. Carter. 2 Stra. 994. Fletcher v. Huntington. 2 Burr. 944. 1 Bl. Rep. 210. S. C.

"But under the statute nothing but an absolute *payment* "after the day is pleadable."

Therefore

Undrhill v. Matthews. Pasch. 1 Geo. 1, C. B. Buller N P 171. [226]

Therefore a *tender and refusal* of principal and interest at a subsequent day cannot be pleaded in bar, as not being within the equity of the statute; for such construction would be prejudicial, as it would impower the obligor at any time to compel the obligee to take his money without notice.

1 Burr 434. Cowp. 109,

2. "*If no interest has been paid on a bond for twenty years*, "it shall be in law presumed to be satisfied; and in such "case the defendant may plead *solvit ad diem*, and rely on "the presumption: and Lord *Raymond* has left it to the jury "on sixteen years, where there were circumstances to forti- "fy the presumption."

"Wherever therefore the defendant relies on this pre- "sumption of payment, the *onus probandi* lies on the plain- "tiff, to prove payment of interest after the day, to rebut "the presumption."

Morland v. Bennet. 1 Stra. 562.

For where in debt on a bond of thirty years standing the defendant pleaded *solvit ad diem*, and relied on the presumption, the plaintiff proved payment of interest two years after the thirty, but could prove none paid for the last twenty-eight years. Lord *Raymond* held, that this plea was to be taken strictly (that is here, "paid thirty years ago";) and that the plaintiff having falsified the defendant's plea, by proving the payment of interest two years after, was entitled to judgment: but that the defendant should have pleaded, Payment *after the day*, under the statute; in which case the presumption would have been in his favour.

It is for this reason now usual in cases of this nature, to plead *solvit ad diem*, and *solvit post diem*, which takes in the whole time to twenty years.

"This plea when founded on the presumption is by the "Court taken strictly, and though they allow the presump- "tion of twenty years to be of itself sufficient, yet if the time "falls any thing short of that, they will require other circum- "stances to fortify the presumption of payment; as *ex. gr.* "if an account had been settled between the parties, and no "notice taken of the demand, that shall be deemed a cir- "cumstance to shew that nothing was then due."

Oswald v. Leigh. 1 T. Rep. 270.

And in this case, where the bond was of nineteen years and a half standing, but no circumstances to induce a presumption in its favour, it was held to be no bar.

"These circumstances (as to the time of payment of in- "terest, being within twenty years) being matter of fact, "are proper evidence to be left to the jury to decide."

Fo:

For where to debt on a bond, the defendant pleaded *solvit ad diem*, and relied on the presumption of non-payment of interest for twenty years, the plaintiff offered in evidence an indorsement on the back of the bond, being a receipt for interest on it *ten years before the presumption accrued*: this evidence was refused by the Chief Justice, on the ground that it was the act of the obligee himself, and so should not be admissible evidence; but the Court granted a new trial, for it was proper evidence to be left to the jury, whether the indorsement of the receipt of the money had not been with the privity of the obligor, particularly as a receipt given in that manner is usual, as more safe than on a loose piece of paper. On a new trial the evidence was admitted, and the plaintiff recovered.

Searle v. Lord Barrington. 2 Stra. 826. 2 Lord Raym. 1370. S. C.

But where similar evidence of the indorsement of the receipt of part of the bond was tendered, but appeared to have been made *after the twenty years elapsed*, it was rejected as inadmissible evidence: and the Chief Justice took the distinction, that in the preceding case the indorsement was admitted, because it appeared to have been made at a time when it could not have been thought necessary to encounter the presumption; but this was made after the presumption had incurred.

Turner v. Crisp. 2 Stra. 827.

"And it has been held sufficient to obviate the presumption to shew a claim or demand of the money."

As where the plaintiff shewed two writs of *testatum capias* sued out by him before the twenty years run but not served, because defendant could not be found. Lord *Mansfield* in this case said, there was no ground for the presumption;

Moyle v. Lord Roberts, quot. 1 T. Rep. 271.

3. "Under this issue of *solvit ad diem*, what shall be deemed *a payment* where the defendant is indebted to the plaintiff in different demands, often comes in question. Upon which these points have been settled:

1. "That *he who pays the money* has a right to *direct* to what purpose it shall be applied."

For where the defendant was indebted to the plaintiff in money on a *bond*, and also *for wares sold*, and at the day of payment he tendered the money on the bond. The plaintiff took the money, and said he would *apply it to the payment* of what was due for the wares; but the defendant said he paid it *on account of the bond*: the plaintiff afterwards brought debt on the bond, and it was adjudged against him; for the payment is to be according to the manner the defendant would pay it, not as the plaintiff would receive it.

Anon. Cro. Eliz. 68.

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Therefore where the point turned on payment of earnest, on which the plaintiff relied, and the defendant had pleaded *that he did not accept or receive it as earnest*, the plea was over-ruled;

2 P. Wms. 308.

over-ruled ; for it was not material how the defendant received it, but how the plaintiff paid it, for *quicquid solvitur, solvitur ad modum solventis.*

2. " But there seems to be some diversity in the decisions " at law and in equity, where the debtor makes a payment " *generally*, without appointing how the money is to be ap- " plied."

Heyward v. Lomax. 1 Vern. 24.

In equity it has been held, that if a man owes another money on a security bearing interest, and on another bearing none, (as by mortgage and simple contract,) and he makes a general payment, without mentioning whether it is to be applied to one demand or the other ; that it shall be taken to be paid in discharge of the mortgage, for it is natural to suppose, that a man would elect rather to pay off money bearing interest, than that which carried none.

Perris v. Roberts. 1 Vern. 34.

So where the plaintiff was bound as a surety for *J. S.* in a bond to the defendant, and *J. S.* was also indebted to him on simple contract ; and they came to a settlement, in which it appeared that *J. S.* was indebted on the balance of account in 85*l.* in satisfaction of which *J. S.* made to the defendant a bill of sale of his effects : it was decreed, that the effects should go to pay both demands in equal proportions, and not to be applied to one demand more than to the other.

" The decisions at law have varied from these ; for there " it has been held, that if the payer of the money does not " appoint to what demand it is to be applied, that the receiv- " er may do it."

Goddard v. Cox. 2 Stra. 1194.

As where one *Owen* was indebted to the plaintiff for coals ; he died and made his wife executrix, who also became indebted to the plaintiff on her own account, and then married the defendant, who continued to deal with the plaintiff, and made several payments on account. These sums, if applied to the debt contracted by the wife while sole, and that due as executrix, would discharge both, and the defendant having given no directions how the payments were to be applied, the plaintiff insisted on applying them to pay those debts, and brought his action for the coals furnished to the defendant in his own time : the Chief Justice was of opinion, that as the defendant had not directed the application of the payments, that the right devolved to the plaintiff, who might apply them to the wife's debt while sole ; but as to the demands against her as executrix, as these depended upon assets, and the manner of administering, the plaintiff could not apply them to that demand.

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" It is however to be observed on this case, that though " the general doctrine is there laid down, That where the " payer does not appoint, that the receiver may ; yet this " case may well stand with the former, for the demands in " this

" this case were *of the same nature*, both simple contract " debts ; so that it made no difference to the defendant in " what manner the money was applied, which it would do " where one demand bore interest, and the other did not."

So in this case, where the defendant owed money on two bonds, and paid money on account, but gave no direction to which he would have it applied ; the case was reserved, and it was determined, that the plaintiff had the election to which to apply it. Bloss v. Cuting. quot. 2 Stra. 1194.

" And here it is again observable, that the securities were " of the same nature, nor was it of consequence (as far as " appears) to which bond the payment was applied."

3. " But if there is any relation between the fund from " which the payment is to arise and the security, the fund " shall direct the appropriation of the payment."

As where the defendant was an incumbrancer on an estate *by judgment*, and had also a debt by bond, and received 200*l.* of the purchase of the estate in part, but gave no notice to the purchaser that it was to be applied to the payment of the bond debt : it was decreed to be applied towards satisfaction of the judgment, the 200*l.* being part of the purchase money of the estate affected by the judgment. Brett v. Marsh. 1 Vern. 468.

5. Of the Plea of Accord and Satisfaction.

1. This plea must have two qualities : 1st, It must be such as the party agrees to accept, and be so pleaded : 2dly, It must appear to the Court to be a reasonable satisfaction ; or at least the contrary must not appear. 5 Co. 117. b.

*" As to the first, the defendant should plead that he paid " such a sum of money, *&c. in full satisfaction* of the de- " mand, and *that the plaintiff accepted it* as such." Paine v. Masters. 1 Stra. 573. *[230]

For it is not sufficient to say only that the plaintiff accepted it as satisfaction, unless paid by the defendant as such. Nor is it sufficient that the defendant so paid it, unless the plaintiff accepted it as satisfaction. Hawkshaw v. Rawlings. 1 Stra. 23.

" So in the second case, it should appear that the satis- " faction was a *good and valuable one*, and it should therefore " be set out what it was."

For where to debt on a bond the defendant pleaded an accord and satisfaction, *viz. a release by him of an equity of redemption* of certain premises mortgaged by him to the plaintiff, in lieu of all bonds, *&c.* On demurrer the plea was held to be bad : for an equity of redemption is of no value in the eye of the law, according to *Littleton, sect.* 332. Preston v. Christmas. 2 Wils. 86.

" And for this reason the satisfaction must appear to be " *complete and executed.*"

For

Balston v. Baxter. Cro. Eliz. 304.

For where to debt on a bond, the defendant pleaded payment of part before the day the bond became due, and *a promise to pay the rest at a day to come*, to which the obligee had agreed: it was held to be no bar, for it was executory.

Sir Richard Lovelace v. Cocket. Hob. 68.

And therefore one bond cannot be pleaded in bar of another, for that is of no greater value, unless the security or circumstances are bettered; as by shortening the time of payment.

Norwood v. Gripe. Cro. Eliz. 727.

And the *bettering the security* alone is not sufficient; for a bond *with sureties* is better than a single bond, and yet the former cannot be pleaded in bar to the latter.

Pinnel's case. 5 Co. 117.

2. For the same reason *payment of a lesser sum at the day* can never be pleaded in satisfaction of a greater because by no possibility it can be a satisfaction: *but the gift* of a thing of less value but *different in quality*, as of an horse, or of a robe, &c. may well be pleaded in satisfaction: for these may be as beneficial to the party and valuable as the money.

S. C.

So payment of a *lesser sum before the day* may be well pleaded in satisfaction: or if the *money is to be paid at York*, and the party takes a *lesser sum at London*, that may be well pleaded in bar; for payment of a lesser sum before the day or at a different place, may be of more value to the obligee than the whole when due, or at the place where it was to be paid.

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Preston v. Christmas. 2 Wils. 86. 2 Res. Blake's case. 6 Co. 43. Cro. Jac. 254. 5 Co. 117. b.

3. *As to the form of the plea*, the defendant should plead the accord and satisfaction *of the money due by the bond*, and not of the bond itself: for a bond being a deed, shall only be discharged by a deed: but the payment of the money may be discharged by matter *in fact*. And if a man acknowledges himself satisfied by deed, it is a good bar without any thing received.

6. Of the Plea of Foreign Attachment.

"That the debt has been attached in the defendant's "hands by *foreign attachment*, is another good plea to debt "on a bond."

Upon which these decisions have taken place.

1. "That after the plaintiff has commenced his action in "the courts above, and the defendant appeared, the debt "cannot be attached in the defendant's hand at the suit of "any other person."

Babington v. Babington. Cro. Eliz. 157.

For where the defendant pleaded a foreign attachment of the debt in his hands, *after appearance in the court above*, it was ruled to be a bad plea.

"But a creditor may attach the debt due to his debtor "while the creditor's suit is depending against him in the "courts above; and shewing such matter will be a good "plea in bar."

For

For where to debt on a bond the defendant pleaded, That the debt due by him to the plaintiff had been attached in his hands, in *London* by one *Jaques*; the plaintiff replied, That before the attachment, *Jaques* had brought an action in the Common Pleas against him for the same debt, and made the attachment pending the suit. On demurrer it was resolved that the creditor of the plaintiff might well make such attachment, for that the plaintiff in an action might also levy a plaint whereon to ground an attachment while the suit above was pending, and that it therefore was a good plea in bar. Leuknor v. Huntley. Cro. Eliz. 593.

2. A debt cannot be attached by foreign attachment *before it is due*, though the judgment on the attachment is not till after it become due: and therefore if the defendant was to plead the attachment, the plaintiff might reply this matter, that it was made before the money became due, and have judgment. Dalton v. Selly. Cro. Eliz. 184.

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3. A debt *upon record* by recovery, cannot be attached by the custom of *London*. Sir John Perrot's case. Cro. Eliz. 63.

Therefore where a cause had been referred to an arbitrator, by an order of *nisi prius*, who awarded a sum to be paid by the defendant to the plaintiff on a certain day; at that day some of the creditors of the plaintiff attached the debt in the defendant's hand, and he paid the money to the creditors: it was resolved, that the rule of *nisi prius* having been made a rule of court, that this must be considered as a sum of money ordered to be paid by the court, and so could not be attached; and that the defendant should not be allowed the payment of it as against the plaintiff. Grant v. Hawding. Hil. 7 G. 3. *In not.* 4 T. Rep. 313.

So where a judge's order had been made to tax the plaintiff's attorney's bill, the plaintiff undertaking to pay what was due, and the Master's *allocatur* amounted to 30*l.*: before the attorney had demanded the money, a creditor of his attached it in the plaintiff's hands; it was held to be erroneous, and that money so awarded under a rule of court could not be attached. Coppell v. Smith. 4 T. Rep. 318.

4. "If the defendant pleads a foreign attachment, it should "appear that the plaintiff in this action had notice of the pro- "ceedings in *London* to effect the foreign attachment; for "as his property in the hands of his debtor is to be bound, he "should be made a party and have notice."

For in this case where to an action for goods sold the defendant pleaded the general issue, and gave in evidence a payment under a judgment on a foreign attachment at the suit of one *Janson*, to whom the plaintiff was indebted: but it appeared that no notice had been given to the plaintiff: for that fault he had judgment. This case was that of an administrator, but the principle seems to be general. Fisher v. Lane. 3 Wils. 297.

So if the plea state the custom to be, "That if any person be or hath been indebted to any other person in the city," Morris v. Ludlow. 2 H. Bl. 362.

he ought to aver, "that the defendant in the suit was indebted to the plaintiff within the city."

7. Of the Pleas to Bonds of Indemnity.

Hulland v. Malkin & al. 2 Wils. 126.

To debt on a bond to save harmless, the defendant only can plead, *either that he has saved the plaintiff harmless*, or, *that if he has received any injury, it was through his own default.*

White v. Cleaver. 1 Stra. 681. *[233]

*And where the defendant pleads that he has saved the plaintiff harmless, he should shew *how he had done so.* But as the saving harmless is the substance, and *how* matter of form, the plaintiff should take advantage of the defect in the plea by *special demurrer.*

Dunn v. Vacher, & ux. 2 Stra. 907.

And note, That bonds are within stat. 4 & 5 *Ann. c.* 16. which allows the defendant to plead double; and these pleas following have been allowed. Where the condition of the bond was to marry on request, *non est factum*, and *never requested*, were allowed to be pleaded together.

Atkinson v. Atkinson. 2 Stra. 871.

So *non est factum*, and a *discharge under a commission of bankrupt*, were allowed to be pleaded together.

Arnold v. Bass. 2 Bl. Rep. 993. Co. Litt. 47.

But *non est factum* and *solvit ad diem* cannot be pleaded together, for they are incompatible.

Jenkins v. Edwards. 5 T. Rep. 97.

So in this case the court refused to allow the defendant to plead *non est factum*, and that all was paid except 63*l.* *which was tendered before action brought*, lest there should be an incongruity on the record, as if the defendant succeeded on the first plea there would appear that there never existed such a bond as that declared on, and yet the defendant admitted something to be due on that same bond.

2. OF THE PLEAS IN DEBT FOR RENT.

These are, 1st, *Nil habuit in Tenementis.* 2d. *Non dimisit.* 3d, *Nil debet.* 4th, *Riens en arrere.* 5th, *Entry and Eviction.* 6th, *The statute of Limitations.* 7th, *Infancy.*

1st, Of the Plea of Nil habuit in Tenementis.

Heath v. Vernneden. 3 Lev. 146.

In debt for rent reserved by *deed indented*, the defendant never can plead that the plaintiff *nil habuit in tenementis*; for he is estopped by his deed, which admits the demise. But had the demise been by the lessor by *deed-poll*, lessee might so plead, for the deed is no estoppel as to *him.*

2d, Of the Plea of Non dimisit.

Ibid.

So neither can he plead *non dimisit* where the rent is reserved by indenture, for there too is an estoppel; though for rent reserved by parol, he might so plead.

3d,

3d, Of the Plea of Nil debet.

1. "In all cases where the debt is founded on the deed, "the plea cannot contradict it: but where the deed is the "inducement and matter of fact the foundation of the debt, "there is some diversity." Therefore the defendant to debt for rent reserved by indenture may plead *nil debet*, which in the case of a *bond* he could not do: for an indenture of lease does not acknowledge an absolute debt as a bond does, as the debt arises from the *enjoyment of the thing demised*, and so is but inducement. 2 Lord Raym. 1503. [234] Arg. Hard. 352.

So the defendant may plead *non est factum*, for denying the existence of the deed there can be no estoppel. S. C.

2. But though the defendant may plead *nil debet*, yet he cannot give in evidence under it *that the plaintiff had nothing in the tenements*; because had he pleaded it specially, the plaintiff could have replied the indenture, and estopped him; or the plaintiff might demur; for the declaration being on the indenture, the estoppel appears on the record. 3 Lev. 145. Kemp v. Goodall. Salk. 277.

3. If the lessor accepts rent due at the last day of payment, and gives a discharge thereof and acquittance, this shall discharge all preceding arrears: so that such would be good evidence on *nil debet*; for it is not presumable that a man would give a receipt for the last gale of rent, when the former were unpaid. Co. Litt. 373. a. 3 Co. 65. b. 1 Sid. 44.

So if the defendant pleads *levied by distress*, and so *nil debet*, he may give in evidence a release or payment; and even though there never was any distress made, yet is the evidence of payment or the release good; for *the issue is on the debt*: and the defendant, proving it discharged by any means, supports his issue. Gallaway v. Susach. 1 Salk. 284. Sir Th. Cecil, v. Harris. Cro. Eliz. 249.

4. So if the lessor had covenanted by deed to repair; to debt for rent by the lessor, the lessee may plead, "That he expended the rent in necessary repairs, and so owes nothing;" which it seems by law he may do (though it was doubted by Lord *Holt*, 1 *Ld. Raym.* 420. *ideo quere*); but the defendant must plead this special matter, and cannot give it in evidence on the general issue, for he might have covenant on it against the lessor: but under the general issue the defendant may give in evidence *that he paid the rent to persons who had rent-charges out of the land*, by the command of the lessor; for payment by the plaintiff's appointment, is payment to himself. Taylor v. Bayle. Cro. Eliz. 222.

But where there is an express covenant in the same indenture that the lessee may deduct for charges and repairs, there clearly the defendant may plead it in bar to debt for rent. Johnson v. Carre. 1 Lev. 152.

4th, Of the Plea of Riens en Arrere. [235]

"*Riens en Arrere* is a good plea in debt for rent, though "it would be bad in *covenant* for rent (*Hare* v. *Saville*, 1 *Brownl.* Theobald v. Warner. Cowp. 589.

1 *Brownl.* 19); for in covenant such plea confesses the covenant broken, and goes only in mitigation of damages.

Bull. N. P. 182. 3 Danv. 507.

Under this issue the payment comes in question, and proof by the defendant that *he had given a bond for the rent* to the landlord, which he had accepted, will not amount to a payment; for the accepting a security of *an equal degree* is no extinguishment of a debt (*ante*, 230), and therefore cannot be so here, where the rent is due on a lease, which is an higher security than by bond. *Vid. post. Godfrey* v. *Newton.*

Harris v. Shipway at Monmouth, 1744, per Abney. Bull. N. P. 182.

And *a fortiori* it is bad proof of *riens en arrere*, that the lessor accepted the lessee's *note of hand* for the rent in arrear; for such can never be a discharge of the rent. Here the lessor having taken such note, afterward distrained, the lessee brought trespass, and had judgment against him; for there was no alteration in the debt till payment of the note, so that the distress was lawful.

5th, Of the Plea of Entry and Eviction.

7 Hen. 6. 26.

"*Entry and Eviction* of the whole or any part of the pre-"mises demised, is a good plea in bar to an action of debt "for the rent."

Hunt v. Cope. Cowp. 242.

But a mere entry is not sufficient to cause a suspension of the rent, for such may be merely a trespass, and shall be so deemed: but it must be a tortious *entry and expulsion* so as to prevent an enjoyment of the premises. And therefore in this case, where the lessee pleaded in bar that the lessor entered on the premises and pulled down a summer-house, whereby the lessee was deprived of the use thereof, without saying that he was expelled or put out of the use of the same, it was held to be bad, as not shewing any eviction, so as to cause a suspension of the rent.

"For the *expulsion* must be specially pleaded."

Reynolds v. Buckle. Hob. 326.

Therefore where the defendant pleaded only, that before the rent was due that the plaintiff *had entered* on the premises, but did not say that he had *expelled* or *kept him out of possession*, the plea was adjudged to be insufficient for that reason.

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6th, Of the Plea of the Satute of Limitations.

The statute of limitations is another plea, and is given by stat. 21 *Jac.* 1. *c.* 16. which enacts, "That all actions of "debt for rent arrear, or grounded on any lending or con-"tract without specialty, must be brought within *six years*."

Freeman v. Stacye. Hutt. 109.

But this only extends to rent due on a *parol demise*; for arrears due on an *indenture* of lease are not within the statute.

Neither

Neither is the statute pleadable to any thing but debt on simple contracts; for bonds are only barred by the twenty years and presumption, which is not pleaded but given in evidence (*ante* 226).

"And to matters of record it is not pleadable."

For in debt against a sheriff, it was held that for money levied under an execution he could not plead the statute; for though it is not a record till the writ is returned, yet it is founded on a record, and hath a near relation to it. Jones v. Pope. 1 Saund. 37.

7th, Of the Plea of Infancy.

"*Infancy* is another good plea in debt for rent; but a "*lease made to an infant* is not void, but *voidable* only at his "election on his coming of age: and if he does not then "avoid it, but continues in possession, he is chargeable for "the rent."

Therefore where to debt for rent the defendant pleaded infancy at the time of the lease made: on demurrer the Court held, that the lease was voidable only at the election of the infant, by waiving the land before the rent-day came; but he not having done so, and being of age before the rent-day came, it was deemed an election; and the plaintiff had judgment. Ketsey's case. Cro. Jac. 320.

3. OF THE PLEAS TO DEBT ON MATTERS OF RECORD.

1. Where debt is brought on a judgment, *nul tiel record* is the proper plea. And the issue is tried by producing the record itself, if it be a record of the same court; but if of another court, it must be certified into the court where the action is brought, by *certiorari*. [237] Hewson v. Brown. 2 Burr. 1034.

2. So to debt against a sheriff on an escape on final process, *nul tiel record* is a good plea; for in such case the plaintiff declares on a judgment. In this case the plaintiff demurred to this plea, supposing that it should have been *nil debet*; but it was held to be good. Maddox v. Young. Hob. 209.

But where a *fi. fa.* has issued to the sheriff who has levied the money but not returned the writ, and the plaintiff brings debt for the sum levied, the defendant may plead *nil debet*; because it is then a matter of fact whether the money has been levied or not: but it is a bad plea if the writ has been returned, for then he is bound by the return. Cole v. Acorn. Cas. K. B. 604.

3. In debt on a bail-bond the defendant *cannot traverse the arrest of the principal*; for so all bail bonds that are civilly taken (that is, so as not to expose the party by an arrest) would be avoided. Watkyns v. Parry. 1 Stra. 444.

"But

"But the defendant may traverse the issuing of the writ "on which the principal was stated to have been arrested "and held to bail."

Saxby v. Kirkus. Sayer's Rep. 116.

For where in debt on a bail-bond, the declaration stated that a bill of *Middlesex* issued, upon which *I. S.* had been arrested, and that the defendant had entered into the bail-bond; the defendant pleaded that such a bill of *Middlesex* did not issue, and on demurrer the plea was held to be a good one; for if no such bill of *Middlesex* issued the bail-bond was void, and the plaintiff had no cause of action."

Ordway v. Parret & al. Cro. Eliz. 132.

So to debt, or to a *scire facias* against the bail, "That the principal had paid the money," is a bad plea, except it be pleaded *on record*: for the condition is, "That the defendant (the bail) should surrender the body or satisfy the debt;" and this must be by the most sufficient satisfaction, that is, by record.

Dodd v. Dawson. 2 Vent. 142.

In a *scire facias* against the bail, it was held, that where the principal lay in gaol for two terms, and so might have been discharged by a rule, yet that where afterwards a declaration was delivered and judgment had thereon, that it was good to charge the bail.

2. These are the most material pleas distinctly applying to the several heads of bonds, leases, and matters of record. There are also others which are equally applicable to each of these heads, which now remain to be considered.

These are 1st, A set-off: 2dly, A release: 3dly, a discharge under an insolvent act or bankrupt certificate.

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1st, Of the Plea of a Set-off.

This was first given by stat. 2. *Geo.* 2. *c.* 22. which enacts, "That where there are mutual debts between the plaintiff "and the defendant, or if either party sue or are sued as "executors or administrators, where there are mutual debts "between the testator or the intestate, and the other party, "that one debt may be set off against the other, and such "matter given in evidence on the general issue, or pleaded "in bar: but if intended to be given in evidence on the "general issue, notice must be given of the particular sum "intended to be set off, and on what account it has become "due." It was afterwards further enacted, by stat. 8 *Geo.* 2. *c.* 4. "That mutual debts might be set off against "each other, *notwithstanding such debts were of different na-* "*tures*, unless in cases where either of the debts accrued by "reason of a penalty contained in any bond or specialty; "in which case the debt intended to be set off must be "pleaded in bar, and in which plea shall be shewn how "much is truly due on either side; and in case the plaintiff "shall

" shall recover, judgment shall be entered for no more than " appears to be due after one debt set against another."

Under these statutes it has been decided,

1. " That the debts which can only be set off against each " other, are such as are *certain and liquidated*, and such as " *assumpsit* would lie for to recover." Per Cur. Cowp. 57.

Terefore where to an action of covenant the defendant pleaded a set-off of other *damages* done to him by the plaintiff and unliquidated, the plea on demurrer was held to be bad; for by Lord *Mansfield* the act of parliament and the reason of the thing refer only to *mutual debts*, and damages are not debts. Howlet v. Strickland. Cowp. 56.

So where to an action of covenant for rent, defendant pleaded, that by the indenture on which the action was brought he had covenanted to render up the premises in good repair at the end of his term (casualties by fire and tempest excepted); and then averred, that the premises had been injured by a violent tempest, and that he had laid out a larger sum in repairing them than the money due on the covenant, which he offered to set off: this was held to be clearly a bad plea. Weigall v. Waters. 6 T. Rep. 488.

So where in *assumpsit* for 40*l.* lent, the defendant pleaded articles of agreement with mutual covenants, in a penalty of 200*l.* for non-performance, and shewed a breach whereby the penalty had incurred, and offered a set-off. On demurrer the plea was over-ruled, and held not to be within the statute; for the penalty is not the whole sum, but sounds in *damages* which are uncertain. Nedriff v. Hogan. 2 Burr. 1024. Freeman v. Nyett. 1 Bl. Rep. 394. S. P.

" But sums in the nature of *liquidated damages* for breach [239]
" of any agreement, *and not in the nature of a penalty merely*, " may be set off."

As where the defendant contracted with the plaintiff and another to do certain iron-work in a limited time, and a bond was entered into accordingly, whereby the plaintiff and the other person, stipulated so to do the work within such time, or to pay a certain weekly sum of 10*l.* for every week it should remain unfinished. It was adjudged that these several weekly sums were in the nature of damages liquidated and agreed upon between the parties themselves, and so that the defendant might set them off against any demand the plaintiff might have against him. Fletcher v. Dyke. 2 T. Rep. 32.

2. " The debt to be set off must be *a good and subsisting* " one when the action is brought," and therefore *a debt barred by the statute of limitations* cannot be set off; and if it be given in evidence on notice of set off, the plaintiff may reply the statutes of limitations; or the plaintiff may object to it at the trial, if attempted to be given in evidence, for the object of the statute being to prevent circuity of action, such Buller N. P. 180.

such debts only shall be allowed to be set off for which an action could be maintained.

Ante. 88. So where a party paid money *voluntarily*, though the party to whom it is paid had no title to it, it shall not be set off.

"It must therefore be an absolute debt due to the defend-"ant."

Hutchinson v. Sturges. Trin 14 G. 2. C. B. Buller N. P. 179. For where in debt on a bond, the defendant pleaded a greater debt in bar, upon which the plaintiff prayed to have the condition of the bond enrolled; which was to appear *at Westminster*, and demurred; it was held, That this bond was not within the stat. 8 *Geo.* 2. for that statute relates to bonds *for the payment of money*, and not to bail-bonds: neither was it within the statute 2 *Geo.* 2. because the plaintiff did not bring the action in his own right, (he being an officer,) but as trustee for another.

Lofting v. Stevens. Mich. 1753. Buller N. P. 180. But if the bond had been given to the sheriff and *by him assigned to the party*, it had been otherwise, for then the penalty would be considered as the debt, which the party might sue for as assignee of the sheriff, under statute 4 and 5 *Ann. c.* 16.

3. "The debts which can be set off must be such as *are* "*due in the same right.*"

Paynton v. Walker. Pasch. 4 G. 2. C. B. Buller N. P. 179. Therefore in an action of debt against a man *on his own bond*, he cannot set off a *debt* due to him *in right of his wife*.

Wilson Ass. of Fletcher v. Watson and Creighton. Mic. 23 G. 3. *[240] So where the defendants were insurance-brokers, and the bankrupt before his bankruptcy had underwritten for *them several policies on goods, the property of others, which had been losses, and for which the bankrupt was liable: to an action brought against the defendants for *money due to the bankrupt*, they pleaded a set-off of *these losses*: but it was held, That the losses being on goods the property of others, that the debts were properly to them, not to the brokers; and therefore could not be set off to a demand against the broker himself.

Grove v. Dubois. 1 T. Rep. 112. But where the broker had a commission *del credere*, and so was at all events answerable to his correspondents, (the owners of the goods,) it was held, That to an action brought against him by the assignees of the underwriter, that he might set off losses happening before the bankruptcy, as his own debt, or give them in evidence under the general issue.

But to the above rule there are some exceptions.

Slipper v. Stidstone. 5 T. Rep. 493. As a debt due to one as a surviving partner may be set off to an action brought for a debt in his own right.

Andrade v. French. 6 T. Rep. 582. So a debt due from the plaintiff, as a surviving partner, to the defendant, may be set off against a debt due from the defendant, to the plaintiff in his own right.

&c.

So where the plaintiff's testator appointed the defendant his attorney to collect his rents, and after his death the defendant received rent which was in arrear in the testator's lifetime: the plaintiff who was executrix, brought an action for the money in her own name; and the defendant gave notice to set off a *debt due by the testator to him*: but he was not allowed to give it in evidence on the trial, for the rent was due *to the executrix*, and never belonged to the testator; so that he never had any cause of action against the defendant, as the money was not received till after his death, and the money intended to be set off was a debt *by the testator himself*; and so the rights were different. Shipman v. Thomas. Pasc. 11 G. 2. C. B. Bull. N. P. 80.

But where the testator has been indebted in his lifetime to the defendant, there the debt is clearly within the statute to be set off: and in such case the executor may admit such set-off without bringing an action. Brown v. Holyoak. 8 G. 2. Bull. N. P. 179.

4. "*Money received by judgment* may be set off."

In this case there were cross actions, *Baskerville* against *Brown*, for 10*l.* and *Brown* against *Baskerville* for 30*l.* on notes, and both were to be tried at the same sittings. *Brown* v. *Baskerville* came on first, and *Brown* had a verdict for 30*l.* and he had given notice of a set-off of the notes: It was held that on the second action *Brown* might give the former verdict in evidence, and bar *Baskerville's* demand by so much of it as amounted to the whole of it, and enter a *remittitur* on the first record for so much. Baskerville v. Brown. 2 Burr. 1129.

So where the lessor of the plaintiff had a judgment for 40*l.* debt and costs, in a suit of the preceding term for the use and occupation of an house; and in the next term was nonsuited in an ejectment against the same defendant, the costs of which were taxed to 12*l.* the court on motion ordered, that one demand should be set off against the other. Thrustout, ex. demis. of Barnes. v. Crafter. 2 Bl. Rep. 816. [241]

In the foregoing cases the two judgments to be set off were in the same court; but in this case, where the defendant had a *judgment in the King's Bench* for 102*l.* against the plaintiff, and the plaintiff had a *judgment in the Common Pleas* for 106*l.* this last court allowed on motion, one to be set off against the other. Barker v. Braham. 2 Bl. Rep. 869. 3 Wils. 396. S. C.

But in cases of this nature the *attorney* having a lien for his bill of costs on the money recovered by the judgment, the court will not permit one judgment to be set against the other *to the full extent of it*, without securing to the attorney the amount of his bill. Mitchell v. Oldfield. 4 T. Rep. 123.

5. If debt is brought on a bond conditioned for the payment of an annuity, the defendant may have a set off against the arrears of the annuity due at the time of the action brought; Collins v. Collins. 2 Burr. 820.

brought; and the bond is not thereby discharged but remains as a security for the growing arrears.

6. "If the defendant gives notice of set-off, *it must be certain as to every matter whereby it accrues.*"

Fowler v. Jones. Sittings at Westminster. Hil. 8 G. 2. Bull. N. P. 179.

Therefore where the notice of set-off was in these words, "Take notice that you are indebted to me for the use and occupation of an house for a long time held and enjoyed and now lately elapsed:" The debt intended to have been set off was *rent reserved on an indenture*, which not being mentioned in the notice, the court would not admit it in evidence; for if it had been shewn, the plaintiff might probably have proved an eviction, or some other matter to avoid the demand. These notices should be almost as certain as declarations.

Cook v. Dixon. B. R. 1735. Bull. N. P. 179.

From hence it appears, that where the plea of set-off is *of an equal sum* to that declared for, the action is barred: but where it is of a lesser sum than that for which the action is brought, the defendant must pray to have it set off.

Blackburn v. Matthias. 2 Stra. 1267.

And *note*, That as stat. 2 *Geo.* 2. requires notice where the defendant means to give a set-off in evidence, where in this case the defendant had pleaded the general issue, but forgot to give notice, he was allowed to withdraw his plea and give the notice.

Cowp. 135.

7. The statutes of set off are extended to *bankrupts* by stat. 5 *Geo.* 2. *c.* 30. *s.* 2. which enacts, "That where it "shall appear to the commissioners that there has been a

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"mutual credit given by the bankrupt and any other person, "or mutual debts between the bankrupt and any other person "before the bankruptcy, the commissioners or assignees "shall state the account between them, and one debt may be "set against another; and what shall appear to be due on "the balance, and no more, shall be claimed or paid on either side."

Ridout v. Brough. Cowp. 133.

Though under this act of parliament the commissioners have a power of making and allowing a set-off, yet it does not prevent the right of pleading or giving notice of a set-off to an *action at law*; for if the assignees bring an action for a debt due to the bankrupt estate, the defendant may plead a set-off of a debt due to him by the bankrupt.

"But the debts only which can be set off in this case, are "such as were mutual debts from and to the bankrupt at the "time of the bankruptcy, and for which there were at that "time mutual remedies."

March, assignee of Hay, v. Chambers. 2 Stra. 1234.

For where to an action by the assignees of a bankrupt, the defendant gave notice of set-off, and at the trial produced a note given by the bankrupt prior to his bankruptcy, to one *Scott*, and indorsed by *Scott* to the defendant; but it appearing

appearing in evidence that the indorsement had been made *subsequent to an act of bankruptcy*, it was held, that this could not be set off, for there never was any debt due by the bankrupt to the defendant, and he could not be in a better situation than the indorser of the note, who could only have come in as a creditor under the commission.

In the case or *Ryal* v. *Larkin*. 1 *Wils*. 155, and *Buller*, N. P. 181, it is laid down as law, that the statutes of set-off do not extend to the assignees of a bankrupt, and it is on the ground that if the assignees brought an action for money due to the bankrupt, as the defendant could not have an action against them, but must prove the debt under the commission or proceed at law against the bankrupt himself, that therefore the defendant should not be allowed to set it off. This doctrine is over-ruled as a general one in *Cowp*. 135. But the case itself seems to be reconcileable to the principle now laid down; viz. That the debts to be set off must be mutual at the time of the bankruptcy.

Vid. same case. Buller. N. P. 181.

The case was that to an action for goods sold *by the assignees* to the defendant, he pleaded a set-off of a debt due by bond to him by the bankrupt before his bankruptcy, which was disallowed: and the reasons seem to be, 1st, That as the debt was *for goods sold by the assignees*, that there was no debt due *to the bankrupt*, it was to the assignees, and so there were no mutual debts at the time of the bankruptcy. And, 2dly, That if this was allowed, a creditor might buy up the bankrupt's effects from the assignees under their sale; and if allowed to hold the price as a set-off to his own debt, he might get twenty shillings in the pound, which would be a fraud on the bankrupt laws.

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Dickson v. Evans. 6 T. Rep. 57.

Therefore where an action was brought by the assignees of a bankrupt to recover a debt due to the bankrupt estate, and the defendant set up a set-off of cash notes of the bankrupt, payable to bearer: it was held that he must prove the time when the notes came to his hands, and that that was after the bankruptcy, even though the date of them was before it, and that possession of such was not sufficient to give him a title to set them off without such evidence.

8. "In general, a set-off is only pleadable, or to be taken "advantage of, where the action is for money either *expressly ascertained*, as debt, or in the form of *certain damages*, "as covenant *for rent-arrear*."

Absolem v. Knight. Pasch. 16 G. 2. C. B. Bull. N. P. 181.

For where in *replevin* the avowant justified under a distress for rent, the plaintiff insisted at the trial that there was more due to him than the rent amounted to, which he endeavoured to take advantage of. Justice *Denison* refused the evidence, and on a motion for a new trial, the court held, that the statute 2 *Geo*. 2. did not extend to the case of a distress which was not properly an action, but a remedy

remedy without suit; they likewise declared that it did not extend to detinue, and the like actions of wrong.

Gower v. Hunt. Bull. N. P. 181.

But where the action was covenant for non-payment of rent, the defendant pleaded *non est factum*, and gave notice of set-off; the judge was of opinion, that it could not be given in evidence on this issue. But on a motion for a new trial the court held, that the evidence ought to have been admitted; for the general issue mentioned in the statute must be understood to be any general issue: and a new trial was ordered.

Symons v. Knox. 3 T. Rep. 65.

As to the mode of pleading pointed out by stat. 8 *Geo.* 2. where the action is on bond, the defendant in his plea must set out the sum he admits to be due to the plaintiff; and the defendant may traverse the sum so set out.

Grimwood v. Barritt. 6 T. Rep. 460.

And he may traverse the sum, though laid under a *videlicet*.

2. Of the Plea of a Release.

Litt. sect. 512. 513.

1. If a man be bound by his *deed* to another to *pay him a certain sum* at *Michaelmas* following, and before that time the *obligee releases to the obligor all actions*, he shall be barred of the duty forever, and yet he could not have an action at the time of the release made. But if a man *lets land* to another for a year, *yielding the rent* at *Michaelmas*, and before *Michaelmas* the lessor *releases to the lessee all actions*, yet after the feast the lessor may have his action for the rent, for the release does not discharge it; and the reason is, that the first

Co. Litt. 292. b.

is a debt at the time, for which the obligor has then a right of action, though it is *solvendum in futuro*: but the rent is no debt till the day on which it is payable, for it is payable out of the profits of the land, and if the lessee is evicted before the day, no rent is due; but the lessor may discharge the lessee of the rent before the day, by a special release.

Stephens & ux. v. Snow. 2 Salk. 578. *[244]

*So a *release of all demands* will not operate to release *rent before it becomes due*, for then there is no demand: but it will release *rent then due*.

Bower v. Swadlin. 1 Atk. 294.

2. In the case of *bonds*, if there are two obligors, a release to one is a release to both, as well at law as in equity; for it releases the contract, and so operates in favour of both.

Aloff v. Schrimshaw. 2 Salk. 573. 1 Show. 46. S. C.

But if a man be bound to another in a bond, and the obligee makes a covenant, binding himself not to sue the obligor for 99 years, this shall not operate as a release or defeasance, but merely as a covenant *not to sue*; and therefore is not pleadable in bar to debt on a bond.

Hodges v. Smith. Cro. Eliz. 613.

But a deed of defeasance by which the plaintiff covenanted in consideration of 100*l.* to be paid at a future day, to discharge the defendant of the bond in question, was held to be a good bar.

2. "Though

5. "Though a release of all demands will discharge a "bond, a distinction is to be observed when it is of demands "against the person and against the estate."

For where to debt on a bond against an administrator, he pleaded, That the plaintiff had released all right, title, interest, and demand against the personal estate of the intestate. On demurrer this was held to be no plea: for *per Holt*, there is a difference between a release of all demands to the person of the administrator and to the estate. Here the release is to the estate and void, for the bond is not any demand against the personal estate till judgment and execution sued out. Topham v. Tollier. Salk. 575.

A release cannot be given in evidence without pleading; for it being a discharge by deed, all legal solemnities must be shewn to the court. Dyer 28. 12 Hen. 8. 1.

3. *In case of records*, if a man is bail for another, and *before judgment* the plaintiff in the action releases to bail all actions, duties, and demands, it is no bar; for there was no duty against him till judgment against the principal. Hoe's case. 5 Co. 70, b.

3. Of the Plea of Discharge under an Act of Insolvency, or Certificate as a Bankrupt.

The acts of insolvency are occasional ones, but usually enact, "That any person whose debts do not amount to "100*l.* may, on giving notice fourteen days before to his "creditors, and delivering up upon oath all his effects (his "bedding, apparel, and implements of his trade only ex- "cepted) be discharged on petition to the court from whence "the process issued, or to the sessions." [245]

1. "This act is always construed favourably for the pris- "oners;" and therefore where the prisoner had not given fourteen complete days notice, unless the days of the notice and bringing up were construed to be inclusive, the court held that they might be so. Morley v. Vaughan. 4 Burr. 2525.

2. "The act discharges the insolvent debtor of debts not "due at the time of the taking place of the statute."

As where he was indorser of a promissory note, *which had three months to run at that time*, he was held to be discharged; for it was *debitum in præsenti solvendum in futuro*. Workman v. Leake. Cowp. 22.

So where the act commenced *the 28th of January* 1778, and the bond in which the person was bound was dated *September* 21, of the preceding year 1777, *and was due in September* 1778, it was held to be discharged under the statute, on the same ground. Paget v. Wheate. Quot. Cowp. 23.

But where there is a bond with a penalty, and also a deed of covenant, and the defendant takes the benefit of the act of insolvency, whereby the bond is discharged, he is still liable Cottrell v. Hooke. Dougl. 93.

liable on any future breach of his covenant, unless specially saved by the statute.

Haughton v. Shellcross. 3 Lev. 190.

3. "If the defendant pleads a discharge under the act, "he should bring himself clearly within it." For when he pleaded that he was *imprisoned* on the day mentioned in the act, but did not say *for what*, it was held to be ill; for he might have been so imprisoned for *a fine* to the king for contempt, which would not be discharged by the act.

Laborde v. Pegus. Mich 1772, at West. Gyllom & ux. v. Stirrup. Trin. 2 G. 2. B. R. Buller N. P. 173.

4. In an action by the assignees of an insolvent debtor the certificate made at the sessions is *prima facie* evidence of a due discharge, and of all the proceedings under the insolvent act; and if there has been any fraud or irregularity in the proceeding, it lies on the defendant to shew it: *as want of notice, collusion*, &c.

Savage v. Field. Mic. 9 G. 2. Buller. N. P. 173.

And where in debt upon bond the defendant pleaded the insolvent debtors' act, the plaintiff replied, That there was *no notice given to him pursuant to the act*: and issue being joined thereon, the summoner being dead, the duplicate of the proceedings before the justices was held to be evidence, because the notice was not a matter on which to found their jurisdiction: if it had been so, that evidence would not have been sufficient, but in this case they are judges of the sufficiency of proof of notice, it being part of their jurisdiction, and consequently their duplicate of its being a good notice, will be good evidence, the summoner being dead.

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5. How far the Certificate of a Bankrupt discharges Debts: *Vid. Ch. Assumpsit, pag.* 157, *ante.*

Birch v. Sharland. 1 T. Rep. 715.

In this case, the defendant being in execution at the suit of the plaintiff in *September* 1785, a commission of bankruptcy issued against him; soon after, in order to regain his liberty, he gave the plaintiff a bond and warrant of attorney to confess a judgment for the old debt: the defendant having obtained his certificate, it was contended for him, that the bond having been given for the old debt, it was discharged by the certificate; but the court held, That this bond was given for a new consideration (the obtaining the defendant's liberty) and so was not discharged by the certificate.

1. Having now considered the several pleas in this action with reference to the contract, *the Pleas with Reference to the Person* now remain.

I shall premise a few cases *on the nature of joint and several bonds* or securities.

Gilbert v. Bath. 1 Stra. 503.

1. If two are bound *jointly* in a bond, and one only is sued, the other must take advantage of it by *pleading in abatement*; for if he demands oyer and demurs, the plaintiff shall have judgment; for the Court will presume that the other never sealed it.

And in such case where one only is sued, he cannot plead *non est factum* : for it is his deed, though not his sole deed. Co. Litt. 283. a.

And therefore where the defendant does so plead this matter in abatement, "that another was bound with him," he must plead further, "That the other *did seal and deliver* it as his deed," or the plea will be bad ; for by such means only is the deed good, and without such averment the Court will presume that the other never did seal it. Hollingsworth v. Ascue. Cro. Eliz. 55.

If several are bound together in a bond or deed (as *ex. gr.* merchants in a charter-party) but *they covenant separately*, if the seal of one of the merchants is broken off, it shall not avoid the deed as to the others, for the several covenants are as several deeds ; but had they been bound jointly it had been otherwise : but where they do covenant severally, if a *rasure* is made, it shall avoid the deed as to all ; for that affects *the deed itself*, without any difference as to the parties. Matthewson's case. 5 Co. 22. b.

* 2. If a bond be made to several they must all join in an action, for their interest is joint and they cannot have several actions : the bond in this case was to the plaintiff and another, *& omnibus & cuilibet eorum*, that is joint and several ; when on demurrer it was held, That the interest was joint, and that the words *& cuilibet eorum* should not enable each to bring a separate action. Spencer v. Durant. 1 Show 8. *[247]

But if the bond is so, and one only brings the action, the defendant must take advantage of it by pleading *in abatement* ; for if he pleads it in bar it is bad, and the plaintiff shall have judgment. Isam & Paget. v. Hitchcock. Cro. Eliz. 202.

2. OF PLEAS WITH REFERENCE TO THE PERSON.

I. OF THE PLEAS IN THIS ACTION BY THE HEIR.

"As the heir is chargeable only where he has assets by "descent ; if he has none, the proper plea is *riens per de-* "*scent* ; and this shall refer to the time of the ancestor's "death :

"For it is enacted by statute 3 *& 4 W. & M. c.* 14. "That if the heir alien before action brought, yet he shall "be liable to the value of the land, and if he pleads *riens* "*per descent*, the plaintiff may reply, That he had lands from "his ancestor before the original brought or bill filed ; and "if upon issue joined thereon, it be found for the plaintiff, "the jury shall inquire of the value of the land descended, "and thereupon judgment be given, and execution awarded "as aforesaid (*i. e.* to the value) ; but if judgment be given "by confession of the action, without confessing assets de- "scended, or upon demurrer, or *nihil dicit*, it shall be for "debt and damages, without any writ to inquire of the "value of the land descended."

2. "The

1. " The replication under this statute should be merely " on the descent of the lands, not of their sufficiency to " answer the debt ; for of that the jury are to inquire under " the former issue."

Jefferies v. Barrow. Pasch. 12 Ann. Buller N. P. 176.

For where the defendant pleaded *riens per descent, al temps del original*, and the plaintiff replied, that the defendant *had sufficient lands* before the time of the original purchased ; and on issue thereon, the plaintiff had a verdict, but *there was no inquiry of the value of the land ;* the Court awarded a repleader, for the issue should not have been joined on the sufficiency of the land descended.

2. " The heir cannot have two defences, the one by com- " mon law, the other by statute."

Windsor v. Barnes. Pasch. 15 G. 2. Bull N. P. 176.

*For if to *riens per descent al temps del writ*, the plaintiff replies, That before the time lands descended, the heir cannot rejoin that he sold them, and paid bond-debts to the amount : he ought to disclose the whole in his bar at once.

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Sherwood v. Adderley. 1 Lord Raym. 734.

But in debt on a bond against the heir, on the issue of *riens per descent*, he may give in evidence an *extent* against him on a bond owing by his father to the *King* : but it will be necessary to produce the bond, or a sworn copy of it.

Buckley v. Nightingale. 1 Stra. 605.

3. Where the heir has lands by descent, if *he pays the debt of his ancestor to the amount of the value of the lands*, he shall hold them discharged : and this special matter being pleaded shall be a good discharge, for he is not chargeable farther than the value of the lands descended.

4. By stat. *3 & 4 W. & M. c.* 14. " If the ancestor de- " vises away his lands to a stranger, and dies indebted by " bond or other specialty, the lands shall be liable in the " hands of the devisee ; and the action shall be brought " against him and the heir jointly."

Allan v. Heber. 2 Stra. 1270. 2 Bl Rep. 22. S. C.

And *note*, That if the ancestor devises his estate to his heir, and the tenure and quality is the same, and the limitations unvaried, though *charged with his debts*, the heir shall be in by *descent*.

Gooch's case. 5 Co. 60. a.

So if the ancestor makes *a voluntary settlement*, under which the heir claims, but which is void against creditors by stat. 13 *Eliz. c.* 3 ; in such case the heir shall be in by descent.

2. OF THE PLEAS BY EXECUTORS OR ADMINISTRATORS.

These are, 1st, Retainer, 2dly, Plene Administravit. 3dly, Ne unques Executor.

And first, Of the Plea of Retainer.

1. " By law an executor or administrator is entitled to " retain for his own demand against all others of equal " degree."

" And

"And this whether the debt is due to him in his own right, "or as *trustee* for another."

For where the defendant was *co-trustee in his intestate's marriage-settlement*, under which the intestate covenanted with the defendant and another trustee that he would by his last will and testament, leave, or that his executors or administrators should, within six months after his decease, well and truly pay to the defendant and the other trustee 700*l.* to their executors, &c, the interest to be applied to the maintenance of his wife; for which he bound himself, his heirs, executors, and administrators, in a penalty to the defendant and the other trustee. He died intestate, the defendant administered to him, and being sued by the plaintiff in debt on a bond for 200*l.* it was adjudged, that as the plaintiff's demand and his own were both in the same degree, and as he might as such have paid to the other trustee to the amount of the bond, that therefore he might retain as administrator, although no demand had been made against him either by the wife or her other trustee. Plumer v. Merchant, 3 Burr. 1380. [249]

And it was, secondly, further held as settled, That the defendant might either plead a retainer, or give it in evidence on *plene administravit* pleaded. S. C. Bond v. Green. Brownl. 75.

So where the defendant's husband covenanted with her father *as trustee* for her, on her marriage, to leave her his personal estate and 200*l. per ann.* the marriage was had, and the testator (the husband) died without issue, having made his will, whereby he subjected his real and personal assets to the payment of his debts, and gave the remainder to his wife, whom he made executrix; but his real and personal assets together were not equal to the value of the 200*l. per ann.* annuity from the time of the testator's death. She administered to her husband: it was resolved, that she had a right to retain so much of the husband's effects as would answer the covenant. And 2dly, That she might give this retainer in evidence on the general issue. And Chief Justice *De Grey* there quoted a case as decided, that where a widow executrix had paid off a mortgage on her jointure, which the husband had covenanted to be free from incumbrances, that she might retain to the amount of the sum paid off, out of his other effects. Loane v. Casey. Exr. 2 Bl. Rep. 965.

2. "But this privilege of retainer is only allowed to a right-"ful executor or administrator."

For *an executor de son tort cannot retain*: for so would he have advantage of his own wrong. Coulter's case. 5 Co. 30. 3 T. Rep. 58.

Therefore if the defendant pleads a retainer, he ought to shew that *testator had made him executor*; and it is not enough to say that testator made his will, and that he *susceptо super se onere testamenti*, paid divers debts, and retained for a debt of his own. If he pleads so the plaintiff may either Atkinson v. Rawson. Mich. 27 G. 2.

demur specially for that cause, or reply that he was executor *de son tort*.

Vaughan v. Brown. 2 Str. 1196.

Though when the plaintiff so replies that he was executor *de son tort*, the defendant may plead *puis darrein continuance*, that *he had since obtained letters of administration*; for such administration will legitimate all intermediate acts, and justify a retainer.

Simpson v. Trealer, in Kent. 1661. per Weston. Bull. N. P. 141.

But where administration has been granted to a *creditor*, and afterwards repealed at the suit of the next of kin, the creditor may retain against the rightful administrator; for where administration is granted to a *wrong person*, it is only *voidable*; but if granted in a wrong *diocese*, it is *void*.

Picard v. Brown. 6 T. Rep. 550.

If the defendant, who is sued as administrator, pleads a retainer for a debt due to himself, he need not plead that it is for a just and true debt, neither is he bound to make profert of his letters of administration.

Vide Lord Kenyon's opinion last case, and cas. Ibid.

But if the defendant is sued as executor it should seem that he should set out that he was rightful executor by making profert of the probate of the will; for he might be executor *de son tort*, and so not entitled to retain.

3. "If a person obtains goods of a person deceased, and "thereby becomes executor *de son tort*, he must deliver over "the goods to the rightful administrator *before action brought*, "or he shall be chargeable."

Curtis v. Vernon. 3 T. Rep. 587.

Therefore where in case on promises by the testator, the defendant pleaded that he was never executor but of his own wrong, and that he had delivered over all the goods of the testator, which came to his hands, to the plaintiff the executor, but did not say, *before action brought*; on demurrer the plea was adjudged to be bad, for a delivery of the goods by the executor *de son tort*, after action brought against him, was no discharge to him.

4. And as to what shall constitute a man executor *de son tort*, these points are settled:

Read's case. 5 Co. 33.

1. If a man dies intestate and a stranger takes his goods, and uses them, or sells them, this shall make him executor *de son tort*. 2. But when an executor is made, and he proves the will and administers, if a stranger takes the goods of the testator, and claiming them as his own, uses them, or disposes of them, this shall not make him an executor *de son tort*; but if such stranger, where there is a rightful executor, takes the goods, and claiming to be executor, *pays money or legacies, or receives debts*, there he shall be charged as executor *de son tort*. Or, 3dly, If an executor is appointed and a stranger takes the goods, and meddles with them *before the executor proves the will*, he shall be charged as executor *de son tort*.

Anon. Salk. 313.

2. What

2. What shall constitute an executor *de son tort*, is matter of law, after the jury have found what acts were done by the person charged as such: and if a person employs another to sell the effects of the intestate, and receives the money, which money he has in his hands when the action is brought against him for a debt due by the intestate, he is chargeable as executor *de son tort*. As in this case, where one *Shore*, a publican, a few days before his death, sent to *Porter*, (the defendant) who was his brewer, desiring him to send some one to take care of his cellar, &c. *Porter* sent *Payne* his servant, who sold beer before the intestate's death and after it; he also by the intestate's direction, sold some hogs, the produce of which, and of the beer sold, he paid over to *Porter*; it was adjudged, That this was sufficient to charge *Porter* as executor *de son tort*: and in the present case both parties having paid money into court, that was held to be decisive to fix them.

Padget v. Porter & al. 2 T. Rep. 97.

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But a person who possesses himself of the goods of the deceased under the authority and as agent of the rightful executor, cannot be charged as executor *de son tort*.

Hall v. Elliott. Peake's N. P. C. 86.

So if a person sets up in himself a colourable title to the possession of the goods of the deceased, he shall not be charged as executor *de son tort*. As where goods had been sold on account of a ship to one *Peat* the deceased, which not having been paid for at the time of his death, and the defendant having possessed himself of the ship, on which he claimed a lien, the action was brought against *him* for the price of the goods sold in order to charge him as executor *de son tort*. It being proved that the defendant was the ship's husband, and that he had taken possession of the ship by virtue of a *bona fide* assignment made to him by *Peat* before his death, (though it was objected, that such assignment was void, as not having been registered under Lord *Hawkesbury's* act) Ld. *Kenyon* held, that he had made out a sufficiently legal title to exempt him from being charged as executor *de son tort*.

Femyngs v. Jarrat. Espin. N. P. Cas. 335.

2. Of the Plea of Plene Administravit.

Under this issue it is material to consider, 1st, The order in which debts are to be paid by Executors. 2dly, The manner of pleading the payment of such Debts.

1st, Of the Order in which Debts are to be Paid.

1. An executor is bound to pay *according to the rank of the debts*: that is, after funeral expenses, first, *debts of record*, or by specialty due to the king. 2. *Debts by particular statutes* having precedence to others; as forfeitures for not burying in woollen; for poor's rates; for letters due to the Post-Office, and some others. 3. *Debts of record*: as judgments docketed according to the statute 4 & 5 *W.* & *M.* c. 20.

2 Bl. Com.

c. 20. statutes and recognizances. 4. *Debts due by specialty*, as rent upon bonds or covenants. And, 5th, *Simple contract debts*, as on notes unsealed and verbal promises.

Godfrey v. Newton. Case K. B. 7. Willett v. Earle. 1 Vern 490. 2 Bl. Com. 511.

But though *rent is reserved by parol*, and the lease determined, yet it shall rank as a debt by specialty, and a bond outstanding cannot be pleaded in bar to it, for the contract still remains in the realty.

2. If the executor or administrator pays debts of an inferior before those of a superior degree, he must answer those last out of his own estate. But in order to charge him on that ground, it must appear that *he had notice of such debts of higher degree being then subsisting*. And that is only from the creditor of such debt *bringing an action* against him for it, for that only is legal notice.

Morrice v. Bank of England. 1 P. Wms. 401. *is not*.

And a *bill filed, or a decree in the court of Chancery*, shall be deemed of equal validity to attach a priority of demand, or operate as a notice as an action at law.

Per Lawrence, Justice. 6 T. Rep. 388.

The stat. 4 & 5 *W. & M. c.* 20. enacts, "That no judgment not docketed shall have any preference against heirs, executors, or administrators, in their administration of the estates of the testator or intestate." This statute puts judgments not docketed on the same footing with simple contracts. Under the plea of *plene administravit* the administrator may give in evidence payment of all debts not of an inferior degree: if therefore simple contract debts had been paid by the administrator before a bond debt without notice of the latter, such payment must have been specially pleaded (*Sawyer* v. *Mercer. stag. prox.*,) because bonds are still on the same footing they were before the act of parliament; but the statute having put judgments not docketed on a footing with simple contract debts, payment of bond debts is good evidence under *plene administravit* to this action of debt on a judgment.

Hickey v. Hayter. 6 T. Rep. 384.

Therefore where to debt on a judgment recovered against intestate, and *plene administravit* pleaded, and the defendant gave in evidence payment of bond debts to more than the effects, it was held to be a good answer to the defendant's action, his judgment not having been docketed.

Davis v. Monkhouse. Fitzgib. 76. 1 Mod. 175. S. P.

3. "And notice is so necessary to charge the executor or administrator," That if an action is brought by *a creditor on simple contract, and a judgment recovered*, the executor may plead that judgment in bar to debt on a *bond*; for otherwise an executor or administrator might be ruined, by the obligee keeping the bond without giving notice of it.

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Sawyer v. Mercer. 1 T. Rep. 696.

But where to debt on a bond against an executor or administrator, he pleads a judgment confessed to an action on a simple contract debt, he must further plead, "*That it was without notice of the plaintiff's demand*;" for in such case only

is

is he excused, and otherwise he might defeat all the specialty creditors.

4. In debts of the same degree, *priority of action* does not create a priority of right to payment; for an executor or administrator may confess a judgment to a later brought action in prejudice to a former. Blundwell v. Loverdell. 1 Sid. 21.

"And where two actions are brought in the same term, "the defendant, after pleading *plene administravit* except a "certain sum, to the first brought action, may to the second "plead *plene administravit* except the same sum, and as to "that, that he had confessed it to another action."

Therefore where to debt on a bond against an administrator he pleaded *plene administravit* except assets confessed to another action on a bond of the testator's of the same term, and then depending, and *nil assets ultra*. The plaintiff demurred for cause, that *there was no judgment shewn*, and that it was not priority of *action* but of *judgment* that attached the assets in the hands of the executor, and that therefore an action depending and confession of assets without judgment was a bad plea; but the plea was held to be good, for that *bringing the first action* had given a priority as to the time of pleading and an executor or administrator should not be twice charged, which he would be if this plea was disallowed; for having assets to a certain amount, he was obliged to admit these in his plea to the first brought action. Waters v. Ogden. Dougl. 436.

If a man has an interlocutory judgment against an executor and dies, and his administrator sues out a *scire facias* on it, the executor cannot plead a judgment obtained against him in bar; for the judgment is absolute, and the defendant can only move *to arrest it*. Smith v. Harman. Salk. 315.

"And in this case the plea should shew that no payment "was made after the action commenced by the plaintiff.

For if the defendant in such case pleads so, and *sic plene administravit*, or this last only, the plea should conclude, "That he has no goods or chattels of the testator, *nor had at the day of suing out the writ*, nor ever since:" for without such addition, as the plea refers to the time of its being pleaded, he might have paid debts between the time of the writ being sued out and the plea pleaded, which by law he should not have done. Hewlet v. Framingham. 3 Lev. 28. [253]

5. As to the Order of the Debts in particular.

In strictness, no *funeral expenses* are allowable against a creditor, except the coffin, ringing the bell, parson, clerk, and bearer's fees, but not for pall or ornaments. The usual sum allowed is five pounds. Shelley's case. Salk. 296.

If the testator acknowledges a *statute or recognizance*, with condition to pay a lesser sum at a future day; it will be a Bull. N. P. 141.

bar to debts of inferior degree, *though the day of payment be not yet come*, because it is a present duty, and is on record, on which execution may be taken out without further suit.

Lemure v. Fooke. 3 Lev. 16.

So though a *bond has some time to run* before it is due, yet it is a good bar to debt of inferior degree.

Buckland v. Brooke. Cro. Eliz. 315. Snelling's case, 4 Co. 82. b. Cro. Eliz. 409. S. G.

And by the custom of *London*, simple contract debts due from one citizen to another, in case of intestacy, shall be paid in equal degree with those due by specialty.

2. *In what Manner Payments under Administration are to be pleaded.*

Parker v. Atfield. Salk. 311.

1. An executor or administrator should plead truly and honestly, and though there is a judgment for a *penalty*, he ought to plead the judgment, and shew *how much is really due.*

Ibid.

2. If he pleads several judgments, and any one be ill pleaded or found fraudulent, the plaintiff shall have judgment. As if on such judgments pleaded, the plaintiff was to reply *per fraudem*, and prove *that the debtor was willing to take less than was recovered*, this would be sufficient to prove the judgment fraudulent, unless the executor or administrator could shew that he had not assets even to pay that sum.

Pease v. Naylor & ux. 5 T. Rep. 80.

But where in *assumpsit* against an administratrix, she pleaded judgments recovered and *nil assets ultra*, and plaintiff replied *per fraudem* generally, and proved that the real debts for which the judgments had been recovered were less than the sums for which the judgments had been confessed, it was adjudged, that this should not of itself be conclusive evidence of fraud; but the defendant shall be allowed to give in evidence, that the judgments were confessed by mistake for sums beyond the true amount, and that the plaintiff was apprised of that circumstance before he brought his action, and also, that the sums really due exceeded the assets.

Ibid. Aston v. Sherman. Salk. 298.

3. If an executor or administrator pleads six judgments, *et nil assets ultra*, it is a confession of assets to above five, and the *nil ultra* is not material or traversable, being but form.

Williams v. Fowler. 1 Stra. 407.

And in such case the defendant may plead the judgments generally, *without shewing the consideration of them*: for if fraudulent, that should come out from the other side.

Philips v. Echard. Cro. Jac. 35. *[254]

*So the defendant may plead a statute entered into by his testator and then unpaid, without saying that it was for a *just debt.*

Newton v. Richards. 1 Salk. 296.

But if an executor pleads *filene administravit* to a *scire facias* on *a judgment against the testator*, it is bad; for the plea should shew "*how he had administered.*" For against a judgment he

he should shew how administered; but this should be shewn for cause of special demurrer.

And *note*, That it has been held that an executor is bound to take notice of a judgment obtained against his testator. Littleton v. Hubbins. Cro. Eliz. 793.

4. If an executor pleads *non est factum* to debt on a bond, it is an admission of assets. Ramsden v. Jackson 1 Atk. 292.

So where an administrator on an action brought against him, *submitted to an arbitration*, and bound himself *as administrator* to abide by the award, and to pay what should be awarded, it was resolved, That to debt on the arbitration-bond, he could not plead *plene administravit*, for *submitting to the arbitration was an admission of assets.* Barry v. Rush. 1 T. Rep. 691.

This case is not to be taken in such general terms, *viz.* that the bare submission to an arbitration is an admission of assets, as it must go further, and the executor or administrator bind themselves *to abide the award*, and *to pay what shall be awarded.* Pearson v. Henry. 5 T. Rep. 6.

5. If an executor confesses or suffers judgment to go by default, he admits assets in his hands, and is estopped to say the contrary. And if another action is pending against him at the same time, during which the former judgment was obtained, and he neglects to plead that judgment, and *nil assets ultra*, it is a confession of assets in the second action also. Rock v. Leighton. Salk. 310.

And this is such an estoppel as to the jury, on a writ of inquiry, that if there are not goods of testator's to answer the second judgment, the sheriff should return a *devastavit.*

In general, executors are no further chargeable than they have assets unless they make themselves so by their own act, as *pleading a false plea*; *i. e.* such a plea as will be a perpetual bar to the plaintiff, and which of their own knowledge they know to be false, as *ne unques executor*, or a release: but if an executor pleads a former judgment had against him by another person, and *nil assets ultra*, and the plaintiff reply *per fraudem*, and it be so found, yet shall the judgment only be *de bonis testatoris.* 1 Roll. Ab. 931. Buller N. P. 144.

However, this is so generally laid down, yet in this case, where in *assumpsit* against an executor, he pleaded *non assumpsit* and *plene administravit*, it was insisted that if the plaintiff could prove assets unadministered to any amount, that he must have judgment for the whole. Lord *Mansfield* said, the law had been understood to be so, and many cases decided to that effect; but that he thought it absurd and wrong that the plaintiff should recover of the executor *more than* Harrison v. Beecles. Guildh. Trin. 1796, cited per Lord Kenyon. 3 T. Rep 688.

than the assets in his hands: and the judgment was given accordingly.

Erving v. Peters. 3 T. Rep. 685.

So if an executor has a good defence, and neglects to avail himself of it by pleading it, and has therefore judgment against him, this shall amount to an admission of assets, and shall be conclusive evidence against him in a debt on a judgment suggesting a *devastavit*.

Bird v. Culmer. Hob. 178.

But a *cognovit actionem* is no admission of assets.

6. What he may give in evidence under *plene administravit*, *Vide ante* 251. *Hickey* v. *Hayter*.

3. Of the Plea of Ne unques Executor.

"Under this plea it comes in question, not merely whether the person is actually executor, but whether administration has been properly committed to him or not?"

Burston v. Ridley. Salk. 39.

1. Where there are *bona notabilia* in several dioceses of the same province, there must be a prerogative administration. If there are *bona notabilia* in different dioceses of the different provinces of *York* and *Canterbury*, there must be a prerogative administration in both; but if in one diocese of each province, each bishop may grant administration.

Byron v. Byron. Cro. Eliz. 472.

And *bonds or specialties* are *bona notabilia where the securities are at the time of the death.* But *debts by simple contract* follow the person of the debtor, *and are goods in that diocese where the debtor is at the time of the creditor's death.*

Rex v. Loggen. & al. 3 Stra. 74.

2. If a diocesan bishop grants a probate of a will where there are *bona notabilia* in other dioceses, it *is void.* But if the deceased had *bona notabilia* only in one diocese, and a *prerogative probate* is taken out, it is not void, but *voidable only.* And in such case the diocesan cannot grant a probate till the prerogative administration is repealed.

Griffith v. Griffith. Sayer Rep. 83.

And where it appears that there are *bona notabilia* in any one diocese, the Court will not suppose that there are *bona notabilia* in any other diocese, but will rather intend for the sake of supporting the letters of administration, that the intestate did not leave *bona notabilia* in any other diocese.

Freke v. Thomas. Salk. 39.

3. If administration is granted to one *durante minore ætate of an administrator*, it shall subsist till the administrator attains the age of *twenty-one years*; for an administrator is as a trustee, and no one is capable of acting as a trustee for another till he attains his full age. But if administration is granted to one *durante minore ætate* of *an executor*, this shall cease when the executor attains the age of *seventeen* *years, for the executor is appointed by the party himself, and may by the spiritual law be executor at the age of seventeen.

Pigot's case. 5 Co. 29. a.

*[256]

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But in such case of an administration *durante minore ætate* of an executrix, if she is under seventeen years of age, and she marries a man of full age, the first administration shall cease, for the husband may administer as executor. Prince's case. 5 Co. 29. b.

All these cases therefore, of administration granted irregularly, the defendant may take advantage of.

As to the plea itself, it is to be observed,

1. That if an executor pleads *plene administravit*, and thereupon issue is joined, he has admitted himself to be executor, and therefore cannot shew that he only acted *as agent* for the executor; for then he should have pleaded *ne unques executor*. But if he gives in evidence a retainer, the plaintiff cannot object *that he was executor de son tort, and so could not retain*, without shewing the will, and who were rightful executors. Arnold v. Arnold. Hil. 6 Geo. 2. Per. Eyre. Bull. N. P. 143.

2. Upon the plea of *ne unques executor*, may be given in evidence *that the seal of the ordinary was forged*, or *administration repealed*, or *that there were bona notabilia*; but evidence *that another person is executor*, or *that testator was non compos*, or *that the will was forged*, cannot be given in evidence: for that would be to falsify the seal and proceedings of the ordinary in a matter of which he has cognizance, and wherein he is judge: but in the former cases the seal of the ordinary is admitted and avoided. Jane Noel v. Willet. 1 Lev. 136. 1 Sid. 359. S. C.

3. If an action is brought against a person as executor, and he pleads *that he is not executor, but administrator*, it must be pleaded *in abatement, and not in bar*; for a recovery against one as executor is a good bar to another action for the same cause against him as administrator. Harding v. Salkill. Salk. 296.

And where the defendant does so plead *that he is administrator*, in abatement, he need not traverse *that he ever intermeddled as executor*, which he might have done, and so have been executor *de son tort*; for it shall not be intended that he did so, as all acts are intended to be rightful till the contrary appears. For if in fact the defendant was executor *de son tort*, the plaintiff might reply it; and besides, the defendant need only traverse that which the plaintiff has alleged in his declaration. Fooler v. Cooke. Salk. 297. Powers v. Coote Salk. 298.

But if the defendant is sued as administrator of *J. S.* and pleads *that he is executor*, then the defendant must go on and traverse. "*Absq. hoc that J. S. died intestate*; and the reason is, that unless there was a dying intestate, no action can be brought against one as administrator; and to say that he was executor, is by implication only an answer to the dying intestate. S. C. [257]

3. OF THE EVIDENCE.

I. OF THE EVIDENCE ON THE PART OF THE PLAINTIFF.

"If there is in the declaration any averment which does "not go to the gist of the action, nor is necessary to the "support of it, (as on a collateral matter,) such averment "need not be proved."

Mill v. Hollister. Pasc. 29 G. 2. K. B. Bull. N. P. 167. 1 Wils. 129. S. C.

As where in debt on a policy of insurance, the plaintiff, in his declaration, stated an agreement in the policy, That if any dispute arose, it should be referred to arbitrators chosen by either party, and averred *that it had not been referred*, but without any default in him. At the trial, the plaintiff did not prove *that he had never named a referee*; and it was therefore objected, That he had not proved his declaration. But on a case reserved, the Court were of opinion, that it was a collateral matter, and no part of the contract; and so being not necessary to have been set out, need not be proved.

1. In the case of Bonds.

Bull. N. P. 254.

"As the validity of a deed depends on the *delivery* as well "as the execution of it, both are necessary to be proved."

Chamberlain v. Staunton. 1 Leon. 149.

As where in debt on a bond, the defendant pleaded *non est factum*, and the jury found specially, that the defendant had signed and sealed the bond, and cast it on a table, and *that the plaintiff took it without any other delivery*, or any thing amounting to a delivery, the Court held clearly that this could not be deemed a sufficient delivery in law; and the defendant had judgment.

Parker v. Gibson. Dyer 192.

But where on a like issue the proof was, that the obligor, after it had been written and sealed by his direction, delivered it to the obligee, saying, "This will serve:" this proof was held to be sufficient of the delivery.

Abbot v. Plumb. Doug. 205.

It is therefore a general rule, "*That the subscribing witness to a bond should, in an action on it, be always produced to prove the execution of it,*" unless some reason is shewn why he cannot be produced: neither will the confession of the obligor himself to a third person be sufficient: but if the subscribing witness denies the deed, other witnesses may be called to prove the execution.

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Though the rule now laid down be a general one, yet there are certain exceptions to it.

As

As, 1st, "Where there is a joint bond, but it does not ap-
"pear that there has been any attestation of the execution
"by one of them."

Therefore where in debt on a joint and several bond, and brought against one obligor only, the two subscribing witnesses could prove the execution of the bond only by the other, it was ruled by Lord *Kenyon*, That where there could be no direct proof of the execution of the bond by the subscribing witnesses, collateral evidence was admissible; he therefore admitted a witness to prove, That the defendant had said that he had signed and sealed the bond, and was afraid that he should be obliged to pay it: and the plaintiff had a verdict. Ley v. Ballard. Guildh. Hil. 1790. MSS.

So where two persons were partners in a transaction, and one of them only (but *in the presence of the other*, and *by his authority*) executed the deed in the name of both, it was adjudged to be a good execution to charge both, though he put the seal on but once and so delivered it. Ball v. Dunsterville. 4 T. Rep. 313.

2dly. "Where the subscribing witness *cannot be had* or is
"incapacitated, collateral evidence is good and admissible."

As where the subscribing witness was of the name of *Steele*, who not being produced, the plaintiff proved that a person of that name had gone out to *India*, in a ship of which the defendant was purser, but that inquiries had been made after him, and he could not be found. The plaintiff proved further, that he had applied to the defendant to settle the bond, and that he then offered 80*l.* and to settle the rest with interest at the end of the year. Under these circumstances it was held to be sufficient evidence to support the plaintiff's action, *to prove the defendant's hand-writing* and also the *hand-writing of the subscribing witness*, *Steele*. Coghlan v. Williamson. Dougl. 89.

3dly, Where a fictitious name had been put as a subscribing witness to a bond, Lord *Kenyon* held proof of the party's hand-writing to be sufficient. Fassett v. Brown. Peake N.P. Cas. 23.

4thly, In an action of trover against the defendant by the assignee of a bankrupt, to recover goods which he had received under a bill of sale made by the bankrupt, and which bill of sale was relied upon as the act of bankruptcy, the defendant had produced the deed before the commissioners, and in his examination before the commissioners admitted the execution of the deed. At the trial of the cause, the plaintiff did not call the subscribing witness, but produced the defendant's examination before the commissioners as sufficient proof of the execution of the deed. For the defendant *Abbot* v. *Plumb. supra*, was cited, and insisted, that the calling of the subscribing witness could not be dispensed with. Bowles v. Langworthy. 5 T. Rep. 366.

with. But it was resolved, that the case cited differed from the present, in as much as in that case the deed was produced against a party to it; whereas here it was produced by the party himself, and from his own custody, and therefore superceded the necessity of calling the subscribing witness, as coming within the principle of *Rex* v. *Middlezoy*, 2 *T. Rep.* 41. & *postea* 773.

Henley v. Phillips. 2 Atk. 48.

5thly, Where the witness who attests a bond is *dead*, it is not sufficient to prove his hand, it must also be proved *that he is dead*. This case, though in equity, is there said to be the same at law.

Jones v. Mason. 2 Stra. 833.

So where the subscribing witness had become *infamous*, by a conviction for forgery; on producing the record of the conviction, his hand was allowed to be proved by other witnesses as if he was dead.

" In this last case the witness was incapacitated from be-
" ing a witness, by act of law, in which case collateral evi-
" dence was admitted; and the case is the same in matters
[259] " of necessity, or where the witness is under any legal inca-
" pacity, either by his own means or otherwise."

Godfrey v. Norris. 1 Stra. 34.

As where the person who was *witness to the bond* was afterward *administrator de bonis non to the obligee*, and brought this action on it, and (being the plaintiff) was incapable of being an evidence; proof of his hand-writing was held to be good evidence, and letters from the obligor admitted in evidence, which made mention of the bond.

Lockhart v. Graham. 1 Stra. 35.

So where there were three obligors in a bond, and one only was sued, the other was admitted as an evidence to prove the execution of the bond by the defendant.

" But where a witness is interested as well at the time of
" the attestation, as of the trial, he is inadmissible as a wit-
" ness, neither is proof of his hand-writing admissible."

Swire v. Bell, & al. 5 T. Rep. 371.

For where the bond was conditioned to indemnify the parish of *Elslack* against the charges of a bastard child, and was witnessed by a person who, at the time when the bond was executed, and at the time of the trial, was a parish officer: the Court held the above doctrine. But this being on a motion for a new trial, wherein the plaintiff (who was also a parish officer,) to whom the bond had been made, had had a verdict; and the hand-writing of the defendant having been proved, the Court refused a new trial.

" But the witness must prove the execution of the bond
" by the *defendant* himself."

For

For it is not sufficient to prove *that one who called himself J. S.* (the obligor in the bond) executed it, if the witness did not know him. Memot v. Bates. Hil. 4 G. 2. Buller N. P. 171.

3. Old deeds are held in law to prove themselves: however in this case which was debt on a bond of thirty-two years standing, and the plaintiff insisted on reading it without proof of its execution, Lord *Mansfield* held, That there should be some proof of its authenticity, as by payment of interest, by producing the attesting witness, if living; and in this case, he being proved to be living, and not being produced, the plaintiff was nonsuited. Forbes v. Wale. 2 Bl. Rep. 532.

2. In the case of Leases.

If the defendant insists that the lease declared on is not the plaintiff's the plaintiff may shew that it was made by the one who had authority from him to make it (as his attorney,) and the authority need not be produced. Per Holt. at Maidstone. 1 Ann. Buller N. P. 171.

But where a man gives power to an attorney so to act for him, the attorney cannot do it *in his own name*, nor *as his own act*, but in the name and as the act of his principal: and if made otherwise, it is void. Coombes's case. 9 Co. 75. 2 Res. Frontin v. Small. 1 Stra. 705.

3. In the case of Amercements.

In debt for an amercement, the declaration set out the affeerment *as made by George Wallace, Samuel Buckland, and Joseph Prior:* the court-books were produced, when it appeared that the affeerment had been made by *George Wallace, Samuel Buckland,* and *Joseph Foster, Prior:* it was objected for the defendant that this was a variance; but it was overruled. The declaration further stated, that the defendant was summoned to serve on the jury for the *court leet* and *court baron;* and the summons produced in evidence was for the *court leet* only: Lord *Mansfield* said, This was a matter of strict law, being for a penalty; that the plaintiff was therefore bound to prove the averment as laid, and the summons did not prove it; therefore the plaintiff was nonsuited. Grey v. Wheatly. Sitt. Mich. 1777. MSS.

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So where in debt for an amercement in a *court baron*, the custom was alleged to hold a court twice in the year, where all the copyhold tenants ought to attend, and in case of non-attendance they should be amerced: the plaintiff's witnesses proved the custom to be, to attend personally at one court, and send their essoign-penny to the other. This was ruled by justice *Gould* to be a fatal variance. Turner v. Weaver. Hereford Sum. Ass. 1766. MSS.

4. In

4. In the case of Executors and Administrators.

Welburne v. Dewsbury. Per Ch. J. Eyre. Hil. 12 G. 1 Bull. N. P. 140.

1. If the defendant pleads *plene administravit*, the plaintiff cannot upon this issue give in evidence *a copy of the inventory* delivered by the defendant to the spiritual court, *unless it was signed by him*, though it was signed by the appraisers: but he may give in evidence, *that the defendant had assets*: or if he gives an inventory in evidence, *he may shew that the goods were undervalued.*

Smith v. Davies. Mic. 10 Geo. 2. Per Hardwicke. Ch. J. Bull. N. P. 140. Ayliff v. Ayliff. Hil. 2 G. 2. C. B. Bull. N. P. 142.

So if the inventory produced, and containing the account of the debts due to the testator's estate, does not distinguish between the *sperate and desperate debts*, it will be sufficient to charge the executor with the *whole* as assets, and put him to prove if any of them were desperate: As if the article was, "*Item* for debts due and owing, which I admit myself to be chargeable with when recovered."

Shelly's case. Salk. 296.

But all sperate debts are assets in his hands: for it is saying that he may have them for demanding, unless the demand and refusal be proved.

Taylor and Holman v. Roberts. Sit. after Trin. 1769. Bull. N. P. 169. Mara v. Quin. 6 T. Rep. 1.

2. Where the plaintiff has taken a judgment of assets *quando accederint*, against an executor who had pleaded *plene administravit*, he shall not, in a subsequent action against the executor suggesting a *devastavit*, be allowed to go into evidence *of assets having been in the defendant's hands before that judgment*; for by so taking his judgment, he had admitted that the defendant had fully administered to that time.

Saunderson v. Nicholle. Show. 81.

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3. If the defendant pleads *plene administravit* to an action of *debt*, it admits the debt; for it is for a sum certain: but it is otherwise in *assumpsit*, which is for a sum uncertain and in the form of *damages*; for there the plaintiff must prove his debt.

S. C.

4. If to an action of debt on a bond, and *plene administravit* pleaded, the defendant offers proof of payment of another bond, he must prove that it was sealed and delivered (that is, was a complete deed entitled to priority;) but if the action was on a simple contract, *payment of other debts is only necessary to be proved*; because if there was no bond, it is a good administration in that action; for the simple contract demands are in the same degree.

5. "By no artificial reference of the filing of the bill to "the first day of term, shall the executor or administrator "be injured."

Man v. Adams. 1 Sid. 432.

For if to *plene administravit* the plaintiff replies assets at the time of his exhibiting his bill (*viz.* on the first day of term) if it appears in evidence, that the bill was not filed for some days after, the defendant shall have the advantage of shewing the true time of filing the bill, and he shall not be

be bound by the reference of it to the first day of term ; but he shall be allowed all payments made before the real filing of the bill.

But if to *plene administravit* the plaintiff replies assets at the time of suing out his original, *viz.* on such a day, and the defendant rejoins, that he had no assets then, on which issue is joined, the plaintiff *need not give in evidence a copy of the original* to prove the time of its being taken out, because the defendant admits it by his rejoinder. Bull. N. P. 144.

6. If an executor *compounds with the creditors*, and after, at the suit of any of them, pleads *plene administravit*, proof of the composition would be conclusive of assets, nor would the Court suffer him to give evidence of no assets. Per Holt, Ch. J. Pasch. 4 Ann. Salk. MSS. Bull. N. P. 144.

7. In debt on a bond and *plene administravit* pleaded, the plaintiff *proved payment of interest by the defendant executor from the testator's death, for four years, to the time of bringing the action :* this was held to be good and admissible evidence for the plaintiff, but not conclusive. Cleverley v. Brett. Winton Sum. Ass. 1772. MSS. coram Just. Ashhurst.

8. Where an executor pleads a judgment and *ultra plene administravit*, and there is a replication of *fier fraudem*, the party who has obtained that judgment is an inadmissible witness to prove it to have been given for a good and *bona fide* consideration. Campion v. Bentley. Espin. Cas. N. P. 343.

2. OF THE EVIDENCE ON THE PART OF THE DEFENDANT.

1. In debt on a bond, the defendant pleaded that the money was lent from the *24th of August, to 24th May*, for a premium of 150 guineas ; on evidence, it appeared to be for *nine months*. It was objected, That there was a variance ; for the months should be lunar months, and so that the contract would not reach to the 24th of *May :* but it was adjudged, " That the time should be governed by common understanding, which was calendar months ; and so that there was no variance." Titus v. Lady Preston. 2 Stra. 652. [262]

2. In debt for rent, and *nil debet* pleaded, the defendant may give the *statute of limitations* in evidence ; for the statute is in the present tense, and so makes it no debt at the time of pleading ; but it is otherwise in *assumpsit*. Anon. Salk. 278.

So, on the same issue, the defendant may give *entry and expulsion* in evidence. 1 Sid. 151.

3. Upon *plene administravit* pleaded and *issint riens inter mains*, if it be proved that the defendant had effects of the testator's in his hands, he may give in evidence that *he paid to that value of his own money*, and need not plead it. Co. Litt. 283.

So

1 Mod. 174. So he may, on this issue, give in evidence, That *he was but executor durante minore ætate; that he paid debts and legacies;* and that *he had delivered over the residue of the testator's estate and effects to the infant when he came of age;* for his power then ceases, and the new executor then becomes liable to actions: but he will be answerable for so much as he has wasted; and the new executor has his remedy against him. It is said in this case, that he is not liable at other men's suits; but in 6 *Co. Packman's case*, and *Latch.* 60, it is said he is: of which last opinion Just. *Buller* seems to be.

Packman's case. 6 Co. 186. The decision in *Packman's* case is, That if an administration be to one, which is afterwards repealed, and administration granted to another, that all dispositions and payments made by the first administrator, while his administration remains unrepealed, shall be good; but if he wastes the goods, that any creditor may charge him in debt.

4. OF THE VERDICT AND JUDGMENT.

Per Wild. Just. Pasch. 29 Car. 2. Bull. N. P. 178. 1. The jury, besides finding the debt, ought to give damages for the detention, which is usually one shilling, though under particular circumstances it may be more; as where the principal and interest due on a bond exceed the penalty: in such case the jury ought to give the residue in damages, as well as in debt on a single bill. *Vid.* 2 *Term Rep.* 389.

Ld. Londsdale v. Church. 2 T. Rep. 388. *[263] *And this is now settled, that the jury may so find, though contrary to the case of *White* v. *Sealy*, *Dougl.* 40. in which it is decided, That in debt on a bond, no more is recoverable than the penalty.

2. "Where this action is founded on a contract for a "specific sum, and that grounded on the agreement itself, "the plaintiff can recover only that specific sum, and there "can be no apportionment.

Countess of Plymouth v. Throgmorton. 1 Salk. 65. As where the plaintiff declared in debt, on an agreement to pay him 100*l. per ann.* for his trouble in collecting rents, and brought his action for 75*l.* for three quarters salary, and had a verdict for it in C. P. judgment was reversed: for it was an entire contract for a year's service, and there could be no apportionment for a less time.

Outter v. Powell. 6 T. Rep. 320.

Aylett v. Lowe. 2 Bl. Rep. 1221. 3. The law was formerly, That in all cases of debt the plaintiff must recover the specific sum he went for in his declaration; but the law has been altered in respect to simple contracts.

M'Quillon v. Cox. H. Black. Rep. 249. And it is now settled, that in an action of debt on a simple contract, the plaintiff may prove and recover a less sum than he demanded by the writ. *Ante*, 206.

"So

"So though the debt is by specialty, if it depends on "something extrinsic (as rent *ex. gr.*), there the plaintiff "may have a verdict for what is really due, though more "is demanded." Salk. 659. Per Holt, Ch. J.

4. "But as a sum certain is always claimed, the verdict "must go to the whole of it; that is, if the jury find part "to be due, they must find *nil debet* to the rest." Co. Litt. 227. a.

For where, in debt, on a charter-party, wherein the defendant covenanted to pay fifty guineas per month, and plaintiff declared for 500*l.* due on balance on that account, the defendant pleaded payment for all the time the ship was in his service, and issue being joined thereon, the jury found that 373*l.* remained unpaid; *but said nothing to the rest of the* 500*l.* This was in C. P. and judgment was reversed; for the jury had not answered to the whole demand, and so the defendant might be called upon again. Hooper v. Shepherd. 2 Stra. 1049.

5. If an executor pleads *plene administravit*, and issue is joined thereon, and the jury find that the defendant had goods in his hands, *but do not find the value*, the verdict is void for uncertainty. Co. Litt. 227. a.

If the jury find *assets in Ireland*, it shall charge the executor; for such are assets every where, and the jury may inquire of them. Richardson v. Dowell. Cro. Jac. 55. Dowdall's case. 6 Cro 46.

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2. AS TO THE JUDGMENT.

Courts of law formerly considered the *penalty* of the bond as the debt, and gave judgment accordingly. This drove the defendants into Chancery, where the decree gave only what was really due for principal, interest and costs. For remedy of this it was enacted by stat. 4 & 5 *Ann. c.* 16. "That in all actions brought upon bonds, in which is a "condition or defeasance to be void on payment of a lesser "sum at a day certain, if the defendant shall bring into "court all the principal, interest, and costs of such, the "money so brought in shall be deemed a full discharge, and "the Court shall give judgment accordingly."

Under this statute it has been held,

1. That where the bond is to pay a sum of money *by instalments*, upon failure of payment of any, and action brought on the bond, the defendant may, under the statute, bring the arrears, &c. of the last instalment into court. Bridges v. Williamson. 2 Stra. 814.

But where the bond is in that form, and default made in the payment of any of the instalments the plaintiff *may sign his judgment for the whole sum, but not take out execution till the instalments become due.* Darby v. Wilkins. 2 Stra. 957.

So where the bond was for a sum of money payable at the end of three years, but the interest by half yearly instal- Masfen v. Touchet 2 Bl. Rep. 706.

ments: on default of payment of one half year's interest, the Court allowed the plaintiff to sign judgment for the whole sum, though not then due, but with stay of execution on payment of the interest then due.

"But in these cases the bond must be simply for the payment of money by instalments."

Gowlett v. Hanforth. 2 Bl. Rep. 958.

For where it was so reserved, but there was a further condition, "That if any of the instalments was unpaid, that then the bond should stand in full force for the principal and the interest then due." Default being made, the Court refused to stay proceedings on payment of what was due for the instalments, but gave judgment for the whole money then unpaid.

Bonafous v. Rybot. 3 Burr. 1370.

So where a bond was for payment of a sum of money at a day certain, and the parties agreed that it should be paid by instalments, and the agreement contained a defeasance, which was to be absolute *if the payments were regularly and punctually made*: if not, to be void: default being made in payment of one instalment, the Court held the defeasance void, and that the plaintiff might have judgment on the first bond for what was due.

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Martin v. Moor. 2 Stra. 922.

2. The bail in any action are only liable to the debt sworn to and costs, not to the sum recovered by verdict, if more. *Dougl.* 316.

Mitchell v. Gibbons. H. Bl. Rep. 76.

This is the case in the *King's Bench*, but in the *Common Pleas* the bail are liable to the whole extent of the penalty; that is, to double the sum sworn to.

Frith v. Leroux. 2 T. Rep. 57.

So in the *King's Bench*, the bail in error are not liable beyond the original judgment and costs; that is, not to interest from the time of such judgment to its affirmance in the *Exchequer-chamber*; but they are liable to the interest subsequent to the affirmance of the judgment.

Edsar v. Smart. Sir Th. Raym. 26.

3. If there is a judgment against two, and one of them dies, the plaintiff may have execution against the survivor.

CHAPTER

CHAPTER III.

The Action of Covenant.

COVENANT is an action brought for the recovery of damages, for breach of any agreement entered into *by deed* between the parties.

This agreement must always be by deed; but the action lies equally whether it be by *indenture* or *deed-poll.* F. N. B. 340.

So if the agreement is by indenture, it is sufficient to maintain the action against the covenantor that *he* has sealed it and delivered it to the covenantee, though the covenantee himself never sealed it. Foster & Wilson v. Mapes. Cro. Eliz. 212.

Covenants are either *in deed* or *in law.*

Covenants in deed are such as are expressly mentioned and recited in the agreement between the parties. 1 Co. 80.

Covenants in law are such as the law raises or implies, though not expressed; as if the lessor *demises* to the lessee by deed *for a certain time*, the law always implies a covenant on the lessor's part, that the lessee *shall quietly enjoy during the term.*

Covenants again may be considered with reference to the object: as *real* or *personal*; that is annexed to the *land*, or merely to the *person.*

In treating of this action, I shall consider it, 1. With reference to the Contract or Agreement. 2. With reference to the Person. 3. The Pleadings. 4. Evidence. 5. The Verdict and Judgment.

1. OF COVENANT WITH REFERENCE TO THE CONTRACT.

Under this I shall consider, 1st, The Creation of Covenants. 2dly, The Construction of Covenants. 3dly, Covenants secured by Bond. 4thly, What shall be a breach of Covenant.

1st. OF THE CREATION OF COVENANTS. [267]

1. There is no need of the word *Covenant*, nor of *any particular form of words* to constitute a covenant in deed; for any thing under the hand and seal of the parties *importing* 1 Roll. Abr. 518.

porting an agreement shall support this action, as amounting to a covenant.

1 Roll. Abr. 519. 1 Vent. 10.

As in the case of a lease of lands, in which are the words "yielding and paying" so much rent: this is a covenant, and this action lies for the non-payment; for it is an agreement for the payment of rent, which amounts to a covenant.

Brett v. Cumberland. Cro. Jac. 399. Poph. 136.

So where in a lease of mills were these words, "And the lessee shall repair the mills;" these words were held to make a covenant, for it was the clear agreement of the parties; and being by indenture, it is the words of both.

Walker's case. Roll. Abr. 519.

So in indentures of apprenticeship, where there are no formal words, but only an agreement that the master shall do this, and the apprentice that; yet it is a covenant on both sides.

"But where the word *covenant* is wanting, the words must "*import an agreement*, or the action will not lie."

Holder v. Taylor. 1 Roll. Abr. 518.

As if the lessee for years covenants to repair, *&c.* provided always, and *it is agreed*, "That lessor shall find timber:" this makes a covenant on the part of the lessor, and is a qualification of the covenant of the lessee. But if the words had been only "That the lessee would repair, provided always that the lessor should find timber," (without the words "it is agreed,") this would create no covenant on the part of the lessor, but would be a condition precedent the performance of the lessee's covenant to repair.

2. "*Covenants in law*, differ in this respect from covenants "in deed, that the thing to be performed in the case of cov- "enants in deed is founded *on the words* which express what "is to be done (as yielding and paying, imply covenants "to pay rent;) but covenants in law do not follow the words, "but are the implications of law raised from the express cov- "enants, and required to be performed as necessary to the "enjoyment of the express covenant."

Noke's case. 4 Co. 80. Carth 98.

As in the case of leases for years by the words "*concessi & dimisi*:" these words import a covenant in law on the part of the lessor *that he has a good title*, and therefore if the lessee is evicted, he may maintain an action of covenant: for by reason of the defect of the lessor's title, he could not enjoy the demise which had been made to him.

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Andrew's case. Cro. Eliz. 214.

So upon the words *concessit & ad firmam tradidit*, covenant lies against the lessor if he enters: *aliter* if a stranger enters, unless there is an express warranty.

3. "*A recital of an agreement* in the beginning of a deed "shall create a covenant upon which this action will lie."

An

As where on the demise of a coal-mine, it was recited, "That before the sealing of the indenture it had been agreed that the plaintiff should have the third part dug, &c." On an action of covenant being brought on this, it was objected, That there was no covenant that the plaintiff was to have the third part. But, per *Hales*, were it but a recital, that before the indenture they were agreed, it is a covenant; so to say, "whereas it was agreed to pay 20*l.*" for now the indenture confirms the former agreement by such declaration, and makes it a covenant. Barfoot v. Picard. 3 Keb. 465.

So where the defendant by deed-poll, reciting, That he was possessed of certain lands for years by good and lawful conveyance, assigned the same with divers covenants and agreements, and gave bond for performance, it was resolved, That the recital was to be held as within the condition of the bond, and that if he had not the interest in the land as recited by good and lawful conveyance, that the bond was forfeited. Severn v. Clark. 1 Leon. 122.

4. "Where a covenant refers to a preceding instrument "upon which it is founded, that instrument shall determine "the covenant; that is, the covenant shall extend as far as "the instrument, and no farther."

As where the defendant married *Rebecca Morse*, widow, who had issue by a former husband, *John*, *Samuel*, *Daniel* and *Nathaniel*; to all of whom, *except Nathaniel*, their father had left by will 50*l.* The defendant, before the marriage took place, reciting the said will *as it was*, covenanted *to pay the legacies devised by it*, *viz.* 50*l.* to *John*, *Samuel*, *Daniel* and *Nathaniel*. On covenant brought, the defendant pleaded performance, *viz.* 50*l.* to *John*, *Samuel* and *Daniel*; and the plaintiff demurred for cause that he had not paid 50*l.* to *Nathaniel*, according to his covenant; but it was adjudged, That as the covenant was to pay the several legacies *bequeathed by the will*, that that should rule the extent of the covenant; and as no legacy was in the will given to *Nathaniel*, he should recover nothing. George v. Butcher. 2 Vent. 140.

5. "But where a covenant is founded on a conveyance of "an estate: if the estate intended to be conveyed is void, "the covenant is void also." [269]

As where the conveyance was "a grant of so much of a term as should be unexpired at the death of *A.*," and covenant for quiet enjoyment and bond. This conveyance being void, on account of the uncertainty of the time of its commencement and end (*Co. Litt.* 45. *b.*), the covenants were adjudged to be void, as they depended on the estate. Capenhurst v. Capenhurst. Sir T. Raym. 27.

"But it is otherwise where the covenant is independent "of the estate, as to pay money, &c."

As

Northcote v. Underhill. Salk. 199.

As where the plaintiff declared, that the defendant by his deed did grant, bargain and sell to the plaintiff and his heirs, provided that if the grantor paid so much money, that it should be lawful for him to re-enter, and *that he covenanted to pay the money*, and breach assigned the non-payment of the money; nothing in fact passed by this deed for want of inrolment, and it was therefore argued on the authority of the last case, that the action would not lie; but it was held by Chief Justice *Holt*, That in the last case the covenant referred to the estate, and was to wait on it, and that therefore if no estate was granted or passed, the covenant failed; but that in this case the covenant was separate and independent, and it was not material whether any estate passed or not; and the plaintiff had judgment.

2. OF THE CONSTRUCTION OF COVENANTS.

1st, Of Covenants in general. 2dly, Of special ones usual in Conveyances.

1. Of Covenants in general.

Per Lord Mansfield, in Shubrick v. Salmon. 3 Burr. 1637.

1. "The distinction between the construction of covenants implied by operation of law, and express covenants, is, That express covenants are taken more strictly; and a man may *without consideration* enter into an express covenant by hand and seal, to the performance of which he is at all events bound."

Shubrick v. Salmon. 3 Burr. 1637.

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As in this case, where a master of a ship, by charter-party, covenanted to be at *Carolina* by a certain time, though it appeared *that it was impossible* that he could be there at the time, from storms and other causes; yet it was held that he was bound to go at all events, and to be liable on the covenant.

"For where the covenant is express, there must be an "absolute performance, nor shall it be discharged by any "collateral matter whatever."

Monk v. Cooper. 2 Stra. 763.

As where in covenant for a year's rent from *Michaelmas* 1725 to 1726, the defendant shewed upon oyer of the lease, that he as lessee by covenant was bound to repair in all cases except fire, and then pleaded, that before *Michaelmas* 1725, the premises *had been burned down*, and not rebuilt by the plaintiff during the whole year, *so that he had no enjoyment for the whole time claimed*. But on demurrer, the plaintiff had judgment; for the covenant to pay rent was absolute, and if the defendant had any injury, he should have his remedy, but could not set it off against the demand for rent.

But note these exceptions:

1. If

1. If a man covenants to do a thing which then is lawful, and *a statute comes which declares it unlawful, or hinders him from doing it*, the covenant is annulled by the statute. Salk. 198.

2. If a man covenants not to do a thing which it was then lawful for him to do, and a *statute comes which compels him to do it*, the statute repeals the covenant.

3. But if a man covenants not to do a thing which then was unlawful, and *an act comes and makes it lawful*; yet shall the covenant remain unrepealed.

2. "Covenants are to be construed so as to have effect, and "correspond with the intention of the parties at the time of "making them; therefore a performance according to the "letter, and not according to the spirit of the covenant, is "not a legal performance."

As where the condition of a bond was, that the defendant should before a certain day *deliver to the plaintiff a bond*, wherein the plaintiff was bound to the defendant. If before that day the defendant *sues the plaintiff on the bond and recovers*, though at the day he delivers it up, yet it is no performance, for it could not be the intention of the parties that it should be put in suit. Teat's case. Cro. Eliz. 7. Robinson v. Aunts. 1 Sid. 48. S. C.

"But if the covenant is once well performed, though by "a subsequent act it becomes *of no effect*, yet it is a sufficient "performance."

As if a man be bound that his son (who is then an infant) shall before such a day levy a fine, or (being *infra annos nubiles*) shall marry *B*'s daughter before such a day, and before such time the son levies the fine or marries the daughter, and *the fine is afterwards reversed for error*, or *the son when he comes of age disagrees to the marriage*, yet is the covenant well and sufficiently performed. Leigh and Hanmer's case. 1 Leon. 52. [271]

3. "But where there is any doubt as to the construction "of a covenant, it is a rule, "*that it is to be taken in that sense "which is most strong against the covenantor, and beneficial to "the other party.*"

Therefore where the defendant covenanted with the plaintiff, that if he would marry his daughter that he would pay him 20*l. per ann.* without saying for *how long*, it was held that it should be for the *life of the plaintiff* (the grantee) and not for one year only. For such construction was most beneficial to the grantee, and against the grantor. Hooker v. Swain. 1 Lev. 102. 1 Sid. 151.

"Therefore covenants being intended for the benefit of "covenantees, by no act shall the covenantor be allowed to "defeat the effect of his own covenant."

As

Griffith v. Goodhand. Sir T. Raym. 464. Sir Tho. Jones. 191.

As where the defendant covenanted, "That the plaintiff should have all the grains made in the defendant's brewhouse for seven years," and the breach assigned, was that the defendant *had put hops into the grains by which they were spoiled*, and the cattle would not eat them. The action was held well to lie, for the intention of the parties was, that the plaintiff should have the benefit of the grains, which by this means were useless.

So if I covenant to leave all the timber which is growing on the land when I take it, and at the end of the term *cut it down, but leave it there*, it is a breach of the covenant.

4. "No covenant shall be construed to a greater extent "than the words import."

1. In point of *time*."

Lord Arlington v. Merrick. 2 Saund. 411. 3 Keb 45.

1. In covenant, the plaintiff declared, on an indenture, in which it was recited, "That whereas Lord *Arlington* had appointed *T. Jenkins* to be his deputy postmaster *for six months* next ensuing, and the said *T. Jenkins* covenanted, that during the time he should continue postmaster, he would execute the office, and well and truly pay over such monies as he should receive," &c. &c. The defendant pleaded performance, and the plaintiff replied, That the said *Jenkins* had continued deputy postmaster *for two years after*, and such a day in that time received so much, and had not paid it over. Per *Cur.* No action of covenant will lie; the indenture limits the time to six months, during which the covenant continues, which being expired, the continuance must be on a new agreement, not on the first indenture; and the time mentioned, "during which he should continue," &c. refers only to the six months.

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2. Nor to take in *more persons*, or *different* from those mentioned in the covenant.

Woodruff v. Greenwood. Cro. Eliz. 517.

As where tenant in tail, reversion to the queen in fee, let for twenty-one years, and covenanted that the lessee should enjoy "against all persons except the queen, her heirs or successors, being kings or queens of *England*:" the queen granted by patent her reversion to *Wentworth*; tenant in tail died without issue, and *Wentworth* entered; upon which the plaintiff (the lessee) brought an action of covenant, and it was held well to lie, for this covenant did not extend to the *patentee* of the queen.

3. "Nor to vary *the duty* to be performed."

City of London v Greyme. Cro. Jac. 182.

For where the city of *London* covenanted "To find eight men to grind every day in *Bridewell* dock, and that if they failed in any part, that the defendants should retain so much *per* man out of the rent" (the city being lessors of the house.)

The

The defendants pulled down the corn-mill and erected an horse-mill, and then wanted to deduct so much as was the allowance for the eight men: but it was adjudged, That it could not be done, for *by the change of the subject* the covenant was discharged.

So where on a dissolution of partnership between the plaintiff and the defendant, who were wharfingers, there was a covenant, "That the plaintiff should have a moiety of the goods, and that each should bear an equal share of the expense of weighing and dividing; but that the plaintiff should solely bear the charges and expense of conveying his moiety of the goods to a warehouse he had taken." The breach assigned was, "That the defendant *had not delivered* the moiety of the goods; and on demurrer the defendant had judgment; for there was no part of the covenant *to deliver*, and therefore no action lay on it: though it had been otherwise if the defendant *had obstructed* the plaintiff in removing the goods. Stephens v. Carrington. Dougl. 26.

4. "The operation of a covenant must therefore be confined to that only which is in being at the time of the covenant."

As where in a lease made by the bishop, was that covenant usual in bishops' leases "to pay all taxes;" this shall *not be construed to extend to any taxes *but such as were in being and use before*; that is, synodals, procurations, tenths, and subsidies, and not to any charges or taxes *after imposed*, or *of another nature*. Davenant v. Bishop of Sarum. 2 Lev. 68. 1 Vent. 223. *[273]

5. Express covenants shall qualify the generality and extent of covenants in law. Noke's case. 4 Co 80. 4 Res.

6. Where the covenant is for any thing which is either contrary to law, or such as is contrary to good policy to support, this action cannot be maintained.

Of this description are covenants in restraint of marriage, or in restraint of trade. *Vid.* chap. 2. Lowe v. Peers. 4 Burr. 2225.

2dly, OF PARTICULAR COVENANTS USED IN CONVEYANCES.

These are, 1st, To pay rent. 2dly, For quiet enjoyment. 3dly, To save harmless from all persons claiming title. 4thly, Not to assign. 5thly, For repairs. 6thly, For further assurance. 7thly, To pay taxes. 8thly, Not to plough meadows. 9thly, To surrender or determine the term.

1. Of the Covenant to pay Rent.

Where the lessee *covenants generally to pay rent*, though he has had no enjoyment of the premises, as *where they were burned down*, and there was a covenant to repair in all cases except that of fire, yet shall the tenant be liable for all growing arrears of rent under his covenant. Balfour v. Weston. 1 T. Rep. 310.

2. Of the Covenant for quiet Enjoyment.

Tisdale v. Sir William Essex. Hob 35. Cro. Eliz. 213.

1. Where there is a covenant for quiet enjoyment, this *shall not extend to a tortious ejectment or eviction by a stranger*, because that for this wrong the lessee may have his remedy by action against the stranger himself; but if the lessee be ejected by the lessor himself, there the lessee may have covenant.

F. N. B. 342.

But if the stranger claims *by elder title* than the lessors, the lessee may have covenant against the lessor; for he then can have no redress against the stranger, whose title is good in law.

Arg. Dyer. 328. Hob. 35.

2. It is said, that if the lessor undertakes expressly that the lessee shall enjoy during the term, "quietly, peaceably, and without interruption," this will extend as a covenant *against all tortious ejectments whatever.*

Dudley v. Felliott. 3 T. Rep. 484. *[274]

*But this seems not to be law; for in this case where on the sale of lands in *America*, the defendant covenanted that he had a good title, and "that the grantee should enjoy *without* the let, interruption, &c. of the defendant, and his heirs, and *of and from all and every other person or persons whomsoever.*" The lands in question were seized as forfeited, by the States of *America*, and on covenant being brought on the eviction, the court declined going into the question respecting the legality of the seizure, *America* being then declared independent, but seemed to be of opinion, that a covenant, even extensive as the words in this case, should not extend to a tortious eviction by any person.

Arg. Hob. 35.

However, though the general covenant to save harmless, or for quiet enjoyment, does not extend to the tortious acts of a stranger, yet the lessor may covenant against *the acts of a particular person or persons*; in which case covenant will lie, in case of a tortious ejectment by them.

Perry v. Edwards. 1 Stra. 400.

Therefore where the plaintiff declared, that the defendant had sold a quantity of goods to her testator, which had been arrested at *Archangel* by one *Bell*, and that the defendant covenanted to save him harmless from any costs or charges relating to such seizure, and then averred that *Bell* having arrested those goods, that the testator was put to an expense of 1500*l.* respecting such arrest, which the defendant neglected to pay; it was resolved, That though *Bell's* act might have been tortious, yet that the defendant having expressly covenanted to save the testator harmless against it, that he should be liable.

3. "The breach of this covenant must be by *some act* inconsistent with the covenant."

Whichcott & al. v. Nine. 1 Brownl. 81.

For where the covenant was for quiet enjoyment, without let, trouble, or interruption; and the breach assigned was, that

that the lessee having underlet, *the lessor had forbid the tenant to pay his rent:* it was held to be no breach; for there was no act causing a breach.

So where a tenant for life made a lease for twenty-one years by indenture, and covenanted, "That he had not done any act to prejudice the said lease, but that the lessee should enjoy it against all persons." The tenant for life died, and his lessor entered: on which the lessee brought covenant against the executor of the tenant for life; and it was adjudged, that it lay not; for the last words, *that the lessee shall enjoy it against all persons*, refers to the first words, *for any act done by him;* and so the covenant was not broken. Gervis v. Peads. Cro. Eliz. 615. [275]

But an act of a servant who enters by command of his master, shall be a sufficient breach within this covenant. Seaman v. Browning. 1 Leon. 157.

4. But where the covenant is for quiet enjoyment against *the lawful let, suit, entry, or eviction of the covenantor himself, his heirs and assigns*, a disturbance by him, *if done under a claim of right*, is a breach of covenant: as here where it was by locking up two pews in a church, which had been parcel of the demise on which the covenant was made: and the grantor shall not be admitted to say that the act was *tortious*, and so not within the covenant; neither in this case need the declaration express the disturbance to be under a claim of right, it clearly appearing to be so. Loyd v. Tompkyns. Pasc. 27 Geo. 3. B. R. T. Rep. 671.

5. "This covenant for quiet enjoyment is usually from "any acts of the lessor, or any claiming under him. "Those who claim under him are those *who come in privity "of title*, as heir, executor, assignee."

But there are others to whom this covenant extends.

As in this case, where *feme covert* seised in fee she and her husband levied a fine to the use of the husband for life, with power to make leases with the usual restrictions, remainder to trustees to secure the wife's jointure, remainder over, with a joint power of revocation during their joint lives, and to declare new uses. They did revoke and declare new uses, taking away all the uses which followed the husband's estate for life, and leasing power, and limiting new uses to the wife for life, and after several intermediate remainders, to Lord *Tankerville* in tail. After this new declaration of uses, the husband made the lease in question with the covenant for quiet enjoyment against him, and *all claiming under him.* Lord *Tankerville* having evicted the lessee, covenant was adjudged to lie against the executors of the husband; for though the estate moved from the wife, yet *the husband's assent being necessary to the declaring of the new uses*, Lord *Tankerville* was a person *claiming* under him, and so within the covenant. Hurd v. Fletcher. Dougl. 43.

3. Of

8. Of the Covenant to save harmless.

" This covenant is similar in its nature to that for quiet " enjoyment, and the law as to it is the same."

Perry v. Edwards. 1 Stra. 400.

*[275]

*Therefore this covenant is not broken *by the tortious act* " of any one not claiming under the lessor.

Cowper v. Pollard. 1 Roll. Abr. 433.

For where the lessee of a term rendering rent, assigned it to *J. S.* and *J. S.* covenanted to save the lessee harmless of all rent payable to the lessor, and afterwards *J. S.* let part of the land to the first lessee, and *his hay was there distrained for rent-arrear*; this was held to be no breach of the covenant; for the distress of the hay was unlawful (it being before stat. *W.* 3.) and a trespass; and the sufferance of the rent to be in arrear, was no breach of the covenant without actual damage.

4. Of the covenant that the Lessee shall not alien or assign.

On this covenant it has been decided,

Morgan v. Slaughter. Sitt. Westm. E. 1793 MSS. Espin. N. P. Cas. 8.

1. In an action brought to recover the penalty of 50*l.* for breach of an agreement; the agreement appeared to be, that the defendant agreed to assign to the plaintiff the interest of a lease and the good-will of a public-house at *Greenwich*; and part of the agreement was, " that the lease (which belonged to the defendant, but which he had not by him) should contain none but fair and usual covenants;" and the breach assigned was, the lease contained a covenant " not to alien, assign over, or underlet the premises, without leave of the lessor for that purpose first had and obtained;" which was averred not to be fair and usual, and therefore a breach of the agreement. Lord *Kenyon* was of opinion, that it was a fair and usual covenant, and nonsuited the plaintiff.

Crusoe ex dem. Blencowe v. Busby. 3 Wils. 234.

2. Where the covenant was to that effect, " That the lessee should not assign, transfer, or set over the said premises, or any part thereof," and the lessee *made a lease for part of the time*, it was adjudged, that such *under-lease* was no assigning, transferring, &c. and so was no breach of the covenant.

Pultney v. Holmes. 2 Stra. 405.

3. So where the lessee made a lease of his whole term, *but reserved the rent to himself*, it was held to be no *assignment*, but an under-lease, though lessee parted with his whole term.

Fox v Swan. Style 483.

4. So where the covenant was, " That the lessee should not assign over his term without the lessor's consent first had in writing, and the lessee *devised* the term without any such consent obtained;" this was held to be not such an assignment as was a breach of covenant.

5. So

5. So any *assignment by act of law* is not a breach of this covenant, as if the lessee become a bankrupt, an assignment under his *commission* is not a breach of the covenant. Arg. 3 Wils. 236.

Though this is so laid down in the last case, the point seems not completely settled; for in this case where the question was, Whether in case of such covenant, *an executor* could assign for to carry into execution the purposes of the will? the Court were equally divided. Doe ex dim. Ld. Stanhope. v. Skeggs. Tr. 21 G. 3. B. R.

"But where such assignment is not necessary, the executor or administrator shall be strictly bound by such a "covenant."

For where the covenant in a lease was, "That the lessee, his executors, administrators, or assigns, should not *set, let,* or assign over the whole premises demised, or *any part of them, without *leave in writing* first had and obtained," under penalty of forfeiting the term, and the *lessee's administratrix did under-let* for part of the time; this was held to be a forfeiture, and that leave *by parole* was not sufficient. Roe ex dim. Gregson v. Harrison. Pasc. 28 G. 3. 2 T. Rep. 425. *[277]

6. So where the covenant was not to assign the whole or any part of the lands demised, without the lessor's consent, and the lessor entered into part himself, and then the lessee assigned; this was held to be a breach of the covenant, notwithstanding the lessor's entry. Collings v. Silly. Style 265.

7. If the lessee is bound not to alien or assign without licence, *if that licence is obtained,* and an assignment takes place, *the assignee is not bound by the covenant, but may alien* without licence again obtained ever after: for by the licence the condition is gone and dispensed with. Dumpor's case. 4 Co. 119.

8. So if a forfeiture has incurred by assignment, if the lessor accepts rent afterwards, it is a waiver of the forfeiture; but in such case it must appear, that at the time he accepted the rent he knew of the forfeiture incurred, as otherwise he shall not be bound. 2 T. Rep. 430.

§. Of the Covenant for Repairs, and to deliver up in good Plight as the Lessee received the Premises.

1. If the lessee covenants to keep an house in repair, and leave it in as good plight as it was at the time of making the lease; in this case the *ordinary and natural decay* is no breach of covenant; but the lessee is bound to do his best to keep it in the same plight, and so should keep it covered. Fitzh. Abr. title Covenant, fol. 4.

And where there is this covenant on the part of the lessee, *if he pulls down houses or suffers them to decay,* no action will lie against him *till the end of the term;* for before that time *he may repair them:* but if he *cuts down timber or trees,* covenant lies immediately, *for such cannot be replaced in the same plight,* at the end of the term. F. N. B. 342.

Under

Bullock v. Dommit. 6 T. Rep. 650.

Under a covenant generally to repair, &c. without any exception, the lessee is bound to rebuild the house if it has been burnt down even without the lessee's fault. *Vide Weigal* v. *Waters*, 6 *T. Rep.* 488.

2. "A general covenant to repair, and to deliver up in "repair, shall extend to whatever erections or buildings shall "be raised during the term."

Douse v. Earle. 3 Lev. 264. 2 Vern. 1126. S. C. [278]

For where on a demise of three messuages for forty one years, the lessee covenanted to build *three houses* in the room of those which were then standing, to maintain the houses so to be erected, and to deliver them up in sufficient repair." The lessee erected *five houses*, and at the end of the term *left one of them out of repair:* covenant was adjudged to lie; for the covenant to leave in repair should extend to all.

Beale v. Taylor. 1 Leon 237. 1 Ld. Raym. 420.

3. It has been held, that if the lessor covenants to repair during the term; if the lessor will not do it, the lessee may repair and pay himself by way of retainer; but *Holt*, Chief Justice, doubted of this, unless there was a covenant to deduct the expense of the repairs from the rent.

Prettyman v. Thoras. quot. 1 Sid. 423.

4. If the covenant is, "It is agreed that the lessee shall keep the house demised in good repair, *the lessor putting it in good repair*," covenant lies against the lessor on these words, if he does not put it into repair.

6. Of the Covenant for further Assurance.

Rosewell's case. 5 Co. 19. a.

1. If the covenant is, "That the party shall make such further assurance to the lessee or purchaser, as his counsel shall devise," in this case the *lessor or purchaser himself cannot devise the assurance;* for then it would be no plea to say, *quod consilium non dedit advisamentum;* but the *counsel* should devise it.

Higginbotham's case. 5. Co. 19.

And where the covenant is the same as the last case, *the counsel should not give* the advice or *notice of the assurance* he had devised immediately *to the lessor or bargainer;* but he should give it to his client the lessee or bargainee, who should communicate it to the party who was to make it.

Bennet's case. Cro. Eliz. 9.

2. If *A.* covenanted with *B.* to make such assurance as *B*'s counsel should advise; 1st, *B. must give notice of the assurance*, otherwise *A.* could not know how to make it: 2dly, *B. is to give the assurance to A. for his perusal*, and to take advice on it; and *A.* is to have convenient time to perfect it.

Pierpoint v. Thimbleby. 1 Roll. Abr. 441.

3. If the covenant be to make further assurance *at all times* at the charge of the covenantee, the covenantor shall have a reasonable time to do it, after having notice of what is intended.

7. Of the Covenant to pay Taxes.

1. In this case the rent was reserved in the lease to be paid *without any deduction or abatement whatsoever*; it was nevertheless resolved in this case, that as by the land-tax act the tenant is enabled to deduct the land-tax out of his rent, that *he has a right in all cases so to stop it out of the rent to his landlord, unless there is an express agreement that he should not.* Cranston v. Clark. Sayer's Rep. 78. [279]

2. Where there is the covenant usual in leases that the tenant shall pay all taxes, (*the land-tax only excepted,*) under this clause the landlord is only *bound to allow the land-tax at the rate and in proportion to the rent*, at the time of the demise, not for any increase on account of the improvement of the estate; in this case, on a building lease, the land-tax at the time of the lease made was 3*l.* 8*s.* but in consequence of houses being built, an addition was made to the land-tax of 5*l.* 12*s.* it was adjudged, That the lessor was only obliged to allow the 3*l.* 8*s.* the assessment when the lease was made. Hyde v. Hill. 3 T. Rep. 377.

8. Not to plough Meadow, and to use and deliver up the Land in an husband-like Manner.

In this case it was decided, That this covenant shall only extend to what was *really meadow at the time of the demise*; and if the land is described in the lease under the title of meadow, which in fact is *then arable*, the tenant shall not be estopped by the words of the lease, to prove it not to have been meadow. Skipwith v. Green. 1 Stra. 610.

2. In covenant on a lease whereby the defendant covenanted to use the land in an husband-like manner, and to deliver it up in like condition. In summing up to the jury, Justice *Buller* laid it down, that it was matter of law to determine what was using the land in an husband-like manner, and gave it as his opinion, that under such a covenant the tenant *ought to use on the land all the manure made there*, except that when his time is out, he might carry away such corn and straw as he had not used there, and was not obliged to bring back the manure arising from it. Watson v. Welch. Taunton Lent Ass. 1785. MS.

"An action will lie against a tenant for not using the land "in an husband-like manner, though there is no covenant to "that effect."

For where declaration in this action stated that the defendant became tenant to the plaintiff of a certain farm, &c. *and in consideration thereof* undertook and faithfully promised not to carry away the dung, &c. but would cultivate the land in an husband-like manner, &c. after a verdict for the plaintiff, it was moved in arrest of judgment, that there was no consideration for the promises: the Court held, that the bare relation of landlord and tenant was a sufficient consideration to enable the plaintiff to maintain the action. Powley v. Walker. 5 T. Rep. 373.

9. Of

9. Of the Covenant to surrender or determine the Term.

Portet v. Shepherd. 6 T. Rep. 665.

Where the lease contained several covenants for payment of rent, &c. and there was a covenant, "that the lessee might determine, at the end of three or five years his term, giving six months notice, and that from and after the expiration of such time, *and the payment of all rent and arrears to be paid by the tenant, and performance of covenants*, the indenture should cease and be void; it was adjudged that the payment of rent and performance of covenants was a condition precedent to the determination of the term, and the mere giving notice without such performance would not enable the lessee to determine the lease.

3. OF COVENANTS SECURED BY BOND OR PENALTY.

Per Ld. Mansfield in Lowe v. Peers. 4 Burr. 2225.

1. "There is a difference between covenants in general" "and covenants secured by a penalty or forfeiture. In the "latter, the obligee has his election to bring an action of "debt for the penalty, after a recovery of which he cannot "again resort to the covenant; because the penalty is a satisfaction for the whole: or he may waive the penalty, and "proceed on the covenant, and recover more or less than the "penalty *toties quoties*."

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Another distinction is only in *nature of punishment*, or *in terrorem*, and where it makes part of the agreement as a compensation.

4 Burr. 2228. Rolfe v. Peterson. 6 Brown Cas. Parl. 470.

As if the covenant be "not to plow meadow," and there be a penalty of 50*l.* an acre, there a court of equity will relieve; for there the penalty is as a punishment: but if the covenant had been "to pay 5*l.* for every acre of meadow plowed," this is part of the agreement, and there is no alternative; it is the particular liquidated sum agreed upon by the parties, and is the proper *quantum* of the damages which the jury ought to find.

Lowe v. Peers. Ibid.

And therefore where the covenant was by the defendant not to marry any one except the plaintiff; and if he did, that he would pay her 1000*l.*; this sum, it was held, should be the settled *quantum* of the damages to be found by the jury.

Brigstock v. Stannion, 1 Lord Raym. 107.

2. A difference is also to be observed between assigning a breach on an action of covenant and in debt on a bond for the performance of covenants: that in covenant it is sufficient to assign the breach *in the words of the covenant*; because all is recoverable in damages, and there shall be what the plaintiff can prove he has sustained; but in debt on the bond a *certain breach* must be assigned.

Co. Litt. 282. a

Though if the *substance of the breach* so assigned is proved, it is sufficient, though not precisely as laid: as bond by the lessee

lessee not to cut trees, and breach assigned in cutting *twenty trees*, proof of the cutting of *ten* will support the action; for the cutting of the trees is the substance.

3. At common law, if debt was brought on a bond for performance of covenants, the plaintiff could assign but a single breach. But if the action was covenant, he might assign as many as he pleased.

But it is now enacted by statute 8 & 9 *W.* 3. *c.* 11. *s.* 8. "That in debt on a bond or penal sum, for performance of "covenants, the plaintiff may assign as many breaches as he "pleases, and the jury shall assess damages for such as have "been broken: and in case of judgment on demurrer, or by "*nihil dicit*, the plaintiff may suggest upon the roll as many "breaches as he shall think fit, upon which a writ of inquiry "shall go: but the defendant may pay all damages and "costs, &c. and then there shall be a stay of execution; but "the judgment shall still remain as a further security to an- "swer the plaintiff such damages as may be sustained for [281] "further breach of any covenant in the same indenture, upon "which the plaintiff may have a *scire facias toties quoties.*"

The reason of enacting this statute was this: That at common law the party might bring debt, and recover the whole penalty, which, as it often exceeded the real damage, the other party was driven to equity for that relief which this statute gives.

These decisions on the statute have therefore taken place:

1. If debt is brought for the penalty, and *issue joined* on *nil debet*, the jury should not give a verdict for the whole but *assess damages for each breach assigned*; and therefore, where in this case, the plaintiff took a verdict for the whole penalty, a *venire facias de novo* was awarded. Drage v. Brand. 2 Wils. 377.

2. But where there is judgment *on demurrer*, (or *nil dicit*,) there the plaintiff must have judgment for the *whole* penalty; but he cannot take out execution for the whole, but must sue out a *writ of inquiry*: but the judgment still remains as a security for further breaches. Goodwin v. Crowle. Cowp. 357.

But on the defendant's paying the penalty of the bond and the costs of the action, the Court will order satisfaction to be entered on the record. Wilde v. Clarkson. 6 T. Rep. 303.

And *note*, 1. That if a bond is for performance of covenants, it is forfeited by a breach of a covenant in law; as if the lessee is evicted out of the premises demised. Nokes's case. 4 Co. 80. 2 Res.

2. If a man covenants to enter into a bond to the lessee for the enjoyment of certain lands demised, and does not express what the sum shall be, he shall be bound in such a sum as is *equal to the value of the land.* In Samon's case. 3 Co. 78. a.

4. WHAT SHALL BE A BREACH OF COVENANT.

Under this head I shall consider, at what time a breach of covenant may be committed; and 2dly, In what manner.

1. As to the time.

"*Covenants considered with respect to the time of performance are of three kinds.*"

Dough. 665. [282]

1. "Such as are mutual and independent, where either "party may recover damages from the other for the injury "he may have received from a breach of the covenants in "his favour, and where it is no excuse for the defendant to "allege a breach of the covenants on the part of the plaintiff."

French v. Trewin, 1 Lord Raym. 734.

As here where the plaintiff declared, on a covenant between his testator and the defendant, "That the testator should assign to the defendant an house, and that the defendant should pay 30*l.*:" and the breach assigned was, "That the defendant had not paid the 80*l.*" He pleaded, That the testator had not assigned; and on demurrer it was held, That these covenants were mutual and independent, and the parties might have reciprocal actions: so that the plaintiff's action lay before the assignment.

Boone v. Eyre. 2 Black. Rep. 1312.

So where the plaintiff declared in covenant on the sale of an estate by him in *Dominica*, in consideration of 500*l.* and an annuity of 160*l. per ann.*; and the defendant covenanted with the plaintiff "that he, the said *Boone* (the plaintiff,) well, truly, and faithfully, doing, fulfilling, and performing the several agreements, covenants, &c., that he, the defendant would well and truly pay the said annuity:" the breach was for two years and a half arrears of the annuity. It was adjudged that these were mutual covenants, and not one a condition precedent the performance of the other, and so that one could not be pleaded in bar of the other. Per *De Grey*, Ch. Just. Where the participle "doing, performing," &c. is prefixed to a covenant, it is clearly a mutual covenant, and not a condition precedent.

Campbell v. Jones. 6 T. Rep. 570.

So where *A.*, in consideration of 250*l.* paid by *B.*, and of the further sum of 250*l.* to be paid, &c. covenanted that he would with all possible expedition, instruct *B.* in a certain mode of bleaching linen, (for which he had got a patent,) and *B.* covenanted that he would on or before the 25th of *February* 1794, or sooner if *A.* should have before that time instructed him, &c., pay the further sum of 250*l.*; it was held, that the covenants of *A.* and *B.* were independent covenants, and that *A.* might sue *B.* for the 250*l.* without averring that he had taught *B.* the mode of bleaching linen, &c.

2 Saund. 155.

Of this first species of mutual covenants, and which best shews their nature, are those where there is a *negative covenant*

nant on one part, and an affirmative on the other, in consideration of the performance of the negative.

As where there was a negative covenant not to follow a trade, and in consideration of that the plaintiff promised to pay him 100*l. per ann.* during his life, this was held to be an independent covenant, and not to depend on the performance of the other: for the defendant never can be said to perform his covenant; for a negative covenant never can be said to be *performed*; so that the plaintiff would be without remedy for his 100*l. per ann.* if there were not mutual and independent remedies. Hunlock v. Blacklow. 2 Saund. 155. Cole v. Shallot. 3 Ley. 41. S. P.

Dougl. 665.

2 "The second species of covenants considered with reference to the time of performance are, such as are conditions and *dependent*, in which the performance of one depends on the prior performance of the other; and therefore till the prior condition is performed, the other party is not liable to an action of covenant."

"The principal doubt under this head is, what constitutes a prior condition; and these resolutions following have taken place: [293]

1. The plaintiff declared that he covenanted to transfer to the defendant, on or before the 21st of *September*, so much stock, and that the defendant, *consideratione præmissorum* covenanted to accept and pay for it; and breach assigned that he was ready to transfer, and that the defendant then and there refused to accept or pay for it. On demurrer it was objected, that the transfer was a condition precedent, and that the plaintiff should therefore show an actual transfer before he brought his action; but it was held, that in *consideratione præmissorum* is in consideration *of the covenant to transfer*, not of the actual transfer: that it was therefore not a condition precedent, but that a tender was sufficient to support the action. Blackwell v. Nash. 2 Stra. 535. Terry v. Duntre. 2 H. Bl. Rep. 389. S. P.

2. In executory contracts, if the agreement be, that one shall do an act, and *for the doing thereof that the other shall pay*, there the doing the act is a condition precedent, and the party who is to pay shall not be compelled to part with his money till the thing can be performed for which he is to pay. Thorpe v. Thorpe. Salk. 171.

But there are exceptions.

As if the day appointed for payment is before the time when the thing can be performed, an action may be brought for the money before the thing be done; for then it appears that the party relied upon his remedy; and intended not to make performance a condition precedent: but *aliter* where the day is subsequent to the performance. 3. But

Puter v. Carte. 1 Roll. Ab. 438.

8. But where prior performance is necessary, that performance by one party immediately raises a duty on the part of the other, and he is bound to perform his part within convenient time, and without request.

Per Lord Mansfield. Dougl 665. 6 T. Rep. 571.

4. "The dependence, therefore, or independence of covenants is always to be collected from the evident sense and "meaning of the parties, and however transposed the words "may be, their precedency must depend on the order of time "in which the intent of the parties requires their performance."

Kingston v. Preston. Pasch. 13. Geo 3. B. R. quot. Dougl. 664.

As where the plaintiff declared that the defendant covenanted, "that at the end of a year and a half he would resign his business of a mercer in favor of the plaintiff and another, who should execute deeds of partnership for fourteen years, and, *that immediately after the execution of such deeds, he would permit the plaintiff and such other to carry on the said business* in the defendant's house, and that he (the plaintiff) covenanted that at and before the sealing of the said deeds, he *would procure good and sufficient security* to be given to the defendant to secure to him 250*l.* per month until the value of the stock should be reduced to 4000*l.*" and assigned a breach, that he was always ready to perform his part, but that the plaintiff had not resigned, and refused to surrender up the said business at the time fixed. The defendant pleaded that the plaintiff had not given nor tendered such sufficient security for payment of the 250*l.* On demurrer the defendant had judgment; for the essence of the agreement was, that the defendant should not trust to the personal security of the plaintiff when he delivered up to him his stock and business, and therefore the finding security was a condition *precedent*, and performance should have been averred.

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Dougl. 665.

1 Lev. 293.

3. "The third species of covenants, considered with regard to the time of performance, are such as are mutual "conditions and to be performed at the same time. In "these, if one party is ready, and offers to perform his part, "and the other neglects or refuses to perform his, he who is "ready and offers, has fulfilled his engagements, and may "maintain this action for default of the other, though it is "not certain that either is obliged to do the first act."

Jones & al. v. Barkley. Dougl. 659.

As where the plaintiffs declared on an agreement by the defendant to pay 600*l.* *on the plaintiff's assigning an equity of redemption* of a certain quantity of stock to one *Lane*, and executing to him general releases of all demands of the plaintiff's against him, and then averred that they had *offered to assign* to *Lane* the equity of redemption of such stock as aforesaid, and had *tendered to him a draft of such assignment* and release, and then offered to execute the same, and would

would have then executed the same, but that the *defendant discharged* the plaintiffs from so doing, and that the defendant had not paid the 600*l.*, or any part of it. It was adjudged that the word *on* makes it a covenant to be performed at the same time by each party, and that therefore, where the plaintiffs offered, and were ready to perform their part, and the defendant refused to perform his, that the plaintiffs should maintain their action for the non-performance.

2. "But where the plaintiff relies on a tender and refusal, it should appear that *he could have performed* his part "when the tender was made."

For where the issue was on the tender of stock at a certain day, it was proved that though the books were not open for transfer of stock that day in common form, yet that by leave of a director (which was not usually denied) a transfer might be made, but that the defendant never attended. It was resolved, that the plaintiff had not performed his part so as to entitle him to the action, for perhaps leave might not have been obtained, and so he could not perform his part. Clark v. Tyson. 1 Stra. 504. [285]

3. "Therefore if one party disables himself from performing his part by any act of his own, the other party "is not obliged to *offer to perform* his part, but may have "his action immediately."

As where the lessor covenanted with the lessee to make him a new lease on surrender of the old within twenty years, and before the twenty years expired, the lessor aliened the land to another by fine, it was adjudged that the action lay immediately: for that he had disabled himself to accept a surrender, and so to make him a new lease. Maynie v. Scott. Cro. Eliz. 450. Maine's case. S. C. 5 Co. 20. b.

2. I shall now consider in what *manner* a breach of covenant may be committed.

1. "If the covenant is a *covenant in deed* this action will "lie only for a *misfeasance*, but not for a *nonfeasance*." As if a man grants a way, covenant lies for stopping it up, but not for letting it out of repair. 1 Saund. 321.

"For covenants in deed must be broken by *some act* "done."

As where in marriage-articles the husband covenanted that the lands assured to the wife for her dower were of the yearly value of 1000*l.*, and should so continue notwithstanding any act done or to be done by him, and the breach assigned was *that the lands were not of the yearly value of* 1000*l.* It was adjudged that the covenant would not lie, for there was no act causing a breach. Lord Rich v. Lady Rich. Cro. Eliz. 43.

So where a person let his rectory for three years, and covenanted with the lessee that he should have and enjoy it for the term without any expulsion, or any act to be done by 4 Leon. 48, 49.

by the lessor. The parson was afterwards deprived *for not reading the articles, under stat.* 13 *Eliz.* and his successor having ousted the lessee, he brought an action on the covenant, and it was held not to lie, for this was no act of the lessor, but merely a *nonfeasance*, and so not within the covenant. In like manner, as if a man covenants not to do waste, permissive waste is out of the covenant.

[286] 2. "But in the case of a covenant *in law*, action lies on "it, though there has been *no act* to cause a breach."

Holder v. Taylor. Hob. 12. As where the defendant was lessee by the word *demise*, and covenant was brought by the lessee because that the lessor was not seised, but a stranger, and the action was held well to lie on the covenant in law, though the *lessee had never entered*, and no actual expulsion had taken place; for it would not be reasonable to force the lessee to enter and become by such entry a trespasser.

3. "Breach of covenant must always refer to that which "is the *subject matter of the covenant or undertaking*."

Penn v. Glover. Cro. Eliz. 420. Dobron v. Crew. Cro. Eliz. 705. S. P. As where there was a covenant in the lease of a manor for years, that if the lessee *disturbed*, or put out any of the copyholders paying their duties and services that the lease should be forfeited, *&c.*; and breach assigned, that the lessee entered upon a copyholder in a cowhouse, parcel of the premises, and *beat him*; and for that disturbance this action was brought. On demurrer it was adjudged, that the covenant only applied to disturbance *by ouster of the lands* of the copyholder, not to personal injuries, and so that the covenant was not broken.

Morgan v. Hunt. 2 Vent. 213. So where in covenant for quiet enjoyment by the defendant to the plaintiff, the breach assigned was, "That the defendant *had exhibited a bill in Chancery against him, for ploughing meadow, and obtained an injunction*, which had been dissolved with 20*l.* costs." On demurrer, this was held to be no breach of covenant, for it was quiet enjoyment; and this was a suit for *waste*.

4. "Breach of covenant must always be committed *on* "*that which is granted by and passes under the deed* containing "the covenant."

Lady Russell v. Gulwell Cro. Eliz. 657. For where the plaintiff demised to the defendant certain premises *excepting one close*, and breach was assigned, an entry into this close, the action was held not to lie; for though the execution was an agreement that the close should not pass, yet it was no agreement on the part of the lessee that *he should not occupy nor enter on it*, and therefore his entry was no breach. The only case in which an exception shall be an agreement to charge the lessee is, when he agrees to let the lessor have a thing dehors which he had not before, as a way over the land demised.

5. "To

5. "To support this action, the *breach* must be committed *during the existence of the estate* on which the covenant is placed; for if the estate expires, *at the time* the "covenant is broken, this action, it seems, cannot be maintained." [287]

As where the tenant for life leased for years: the lessee by indenture bargained and sold all his estate, to have and to hold in as ample a manner as he held it; the tenant for life died before all the years were expired, and the bargainee brought his action against the bargainor for the eviction before the end of the term; and it was held not to lie: for this was no warranty; if it had, as by the death of the tenant for life the lease expired, the covenant founded on it determined with the estate. Landydale v. Cheyne. Cro. Eliz. 157. Brudenell v. Roberts. 2 Wils. 143. S. P.

"But if *the estate continues after the breach* committed, the "action will lie even after the estate expires."

As where the covenant was, that the lessee should enjoy the premises discharged of tithes, but that if the lessee was sued for them, and a recovery had, that he should retain so much out of the rent: after the term expired, the lessee was sued for two years tithes owing while he was in possession, and had a recovery against him. He was allowed to recover to that amount in covenant against the lessor. Lanning v. Lovering. Cro. Eliz. 916.

2. OF COVENANT WITH REFERENCE TO THE PERSON.

These are, 1. Such as are joint and several. 2. Such as respect assignees. 3. Heirs and executors. 4. Baron and feme. 5. Tenants in common.

1. OF JOINT AND SEVERAL COVENANTS.

1. Where a covenant is made to many jointly, as "with and to them together, and *quolibet eorum*;" yet shall its construction be determined by the interest which it passes; that is if each of the covenantees hath, or is to have, a *several interest or estate*, there, though the words be joint, each shall have a several interest under the words "*cum quolibet eorum*:" but where the interests are not several, these words shall not make the estate several, which by the former words was created joint. Slingsby's case. 5 Co. 19. b.

"And the action is to be brought therefore jointly or sev- "erally, according to the interest which it passes." Ibid. Matthewson's case, ante 246.

2. "So joint covenants shall be taken distributively for the "benefit of the estate."

As

Meriton's case. Noy 86.

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As where two made a lease and covenanted, "That the lessee should enjoy the land without let from them or any other person," and *one alone* disturbed the lessee; it was adjudged to be a breach of covenant, and that this action lay against the disturber, though the words of the covenant were not several.

3. "Where the covenant is a *covenant in law*, it shall be "taken to be joint, if the interest is so, and that the action "must be brought against the covenantors jointly, *for a breach at the time of the making of it*: but for a *subsequent* "*breach* it may be sued *severally*."

Coleman v. Sherwin. Salk. 137.

The plaintiff declared, on a demise by the defendant *and one* J. S. *virtute cujus* he entered and was possessed till ejected by the defendant, and that neither the defendant nor *J. S.* ought to have demised, for that one *R.* was seised in *fee*. It was resolved that there being no express covenant, the action was founded on the covenant in law, on the word "*Demiserunt*;" and as the interest granted by the word was joint, so was the covenant, and the action should have been brought against both the lessors *for that breach*, and would not lie against the defendant alone. 2. But as to the breach by the *eviction*, it was well assigned; for *it was the act of one only*, and in construction of law each did demise, and it was a several contract as to their subsequent acts.

East Skidmore & al. v. Vaudstevan. Cro. Eliz. 50. 2 Roll. Abr. 220.

4. If a deed indented is made between two parties, and a third person is afterwards named in the deed, and comprised in the covenant, and such third person seals the deed, yet no action will lie for or against him on the indenture; and a release from him shall be void, for he is no party to the deed. But if the deed was a *deed-poll* as to *omnibus Christi fidelibus*, &c. there a covenant may be made to diverse persons.

Lilly v. Hedges. 1 Stra. 533.

5. Where *a covenant is joint and several*, an action may be brought against one, and breach assigned in the neglect of both (as in covenant by two, to receive the plaintiff's rents, and to account; and breach assigned the not accounting, *they nor either of them*;) for perhaps one never sealed the deed, and one man often covenants for the act of another.

Litt. 315. Clayton v. Kinaston. Case K. B. 222.

6. If several covenant jointly and severally, *a defeasance to one is a defeasance to all*: but the covenantee may covenant with one *not to sue him*, and yet sue the others; for though in such case *a release* to one would be a release to all (*Co. Litt.* 232.) and a covenant not to sue is to avoid circuity of action, construed a release, yet it is not so in its nature; and therefore where he has a remedy left against the rest, it shall be construed a covenant, and no more.

But

But two deeds made at the same time, between the same parties *that have not a reference one to the other* shall not be construed a defeasance one of the other. S. C.

And *note*, That in the case of leases for years, the defeasance may be after the first deed. But it is otherwise in the case of freeholds of corporeal inheritances.

2. OF COVENANTS WHICH RESPECT ASSIGNEES.

1st, These are either *against* assignees; or 2dly, By them.

1. OF COVENANT AGAINST ASSIGNEES.

1. When the covenant relates to and is to operate *on a thing in being, parcel of the demise*, the thing to be done by force of the covenant is *quodammodo* annexed to the thing demised, and shall go with the land, and bind the assignee to the performance, though not named. As if the covenant is to repair an house *then demised*, this shall bind the assignee, though not named. But it is otherwise where the covenant relates to a thing *not in being* at the time of the demise. As if it be *to build a wall* on the land demised, this not being *in esse* when the covenant was made, it shall not extend to the assignee, if not named. Spencer's case. 5 Co. 16.

2. But if the covenant mentions the assignee; as if the lessee covenants for him and his assigns, there the assignee shall be bound by any covenant, *for any thing to be done on the thing demised*; as here to build a wall on the lands demised: but to do any thing which is merely *collateral to the thing demised*, as to build an house on some other part of the lessor's land, there the assignee shall not be bound, though he is named. Spencer's case. Ibid.

3. "Wherever a covenant *is for the benefit of the estate* "demised, this shall extend to the assignee, though not "named."

As in this case, where the lessee covenanted for himself, his executors and administrators, "to leave fifteen acres every year untilled," and afterward assigned his estate to the defendant; and the breach assigned was "That the defendant had not left the fifteen acres untilled, but on such "day had ploughed part," &c. exception being taken that the assignee not being named was not liable; it was adjudged, that the covenant *being for the benefit of the estate*, that he was liable. Cookson v. Cook. Cro. Jac. 125. [290]

4. "So a covenant which extends to the *support* of the "thing demised, shall bind the assignee, though not "named."

As a covenant to *repair the houses, &c. demised*—for such is for the support of the things demised, or, according to Dean & Chapter of Windsor's case. 5 Co. 24.

Spencer's case, *ante* 289, extends to it as being *in esse* at the time of the demise, and therefore shall bind the assignee.

Tatem v. Chaplin, 2 H. Black. 133.

So where the covenant was, that the lessee, his executors and administrators, *should reside on the demised premises with their family* and servants during the term demised: the action was against the defendant *as assignee*, and demurrer, that the assignee was not named, and so the action not maintainable; but overruled, for the covenant was one that run with the land, and so bound the assignee, though not named.

Greacot v. Green, Salk. 199.

5. "Though the assignee be named in the original cove"nant; yet if it has been broken before assignment, no "action will lie against him."

Churchwardens of St. Saviour's, Southwark, v. Smith. 1 Bl. Rep. 351. 3 Burr. 1271.

As where the lessee covenanted to pull down certain old houses, and rebuild others within seven years, the lessee did not perform his covenant, and at the end of seven years assigned to the defendant, against whom the action was brought, and held not to lie, *the breach being complete before the assignment.*

6. "To entitle the lessor to maintain an action of cove"nant against a lessee, *as assignee*, he must be assignee of *the* "*whole term.*"

Holford v. Hatch. Doug. 174.

For where the original lessee *made an under-lease for a time, somewhat less than the term of his lease*, and the lessor brought covenant against the under-lessee; it was adjudged not to lie, he not being *assignee*: and the plaintiff, having declared against him in that capacity, was nonsuited. (*Vide ante* 201.)

Tilney v. Norris. Carth. 319. Spencer's case. 5 Co. 17. b.

7. If there is a covenant which runs with the land, as to repair *ex. gr.* and the lessee assigns over, and the assignee dies intestate, the lessor may have covenant against the *administrator* of the assignee, and declare against *him* as assignee. For such covenants bind those who come in by act of law, as well as act of the parties.

Derisley v. Custance. 4 T. Rep. 75.

So where the plaintiff declared on a covenant in his lease for quiet enjoyment, the lease being made by the defendant's ancestor, *and that the reversion came to and vested in the defendant by assignment thereof*; in evidence it was proved, That the land *descended to* the defendant, *as heir* to the first lessor, this proof was held to maintain the issue.

Doug. 736.

8. "With regard to *how far* the lessee or assignee are "chargeable in covenant, there is a considerable difference. "1. The lessee has, from his covenant, both a privity of [291] "contract and of estate: and though he assigns, and thereby "destroys the privity of estate; yet the privity of con"tract continues, and *he is liable in covenant, notwithstanding* Doug. 441. "*the assignment.* But, 2dly, The assignee comes in only in "privity of estate and he therefore *is liable only while in possession.*"

"As

" As to the first, therefore, lessee is liable for a breach " committed by the assignee after the assignment."

In this case it was resolved, That if the lessee assigns, though the lessor accepts rent from the assignee, yet for the breach of any express covenant, *though committed by the assignee after the assignment*, this action will lie *against the first lessee*, on the ground of the privity of contract still continuing. But an action of debt will not. 3 *Co. Walker's case.* — Bernard v. Godscall. Cro. Jac. 309. Norton v Ackland. Cro. Car. 418. S. P.

So where the lessee *became a bankrupt*, and so all his effects assigned, and the assignees sold the term of which he was lessee, he was nevertheless held to be liable on his express covenant for rent arrear, after the sale and assignment by the assignees. — Auriol v. Mills. 4 T. Rep. 94.

But as to the second, that the assignee is liable only while in possession, it was resolved, That if the lessor brings covenant against an assignee of his lessee, the assignee may plead " That before action brought, or cause of action accrued, that he had assigned over: for the assignee is only chargeable in covenant for a breach committed *while in possession*, not for a breach after assignment; as was in this case, the non-payment of rent. — Pitcher v. Tovey. Salk. 81. Show. 340. S. C. Chancellor v. Poole. Doug. 735.

And it is no objection that the assignee may assign to a beggar; for it was the lessor's folly to accept of the original assignee. But he is not without remedy, since the lessee is still liable in covenant, or he may distrain on the land. — S. C.

And though the assignment was to a *feme covert* before the cause of action accrued, yet it is good to discharge the assignee. For the *feme covert* is of capacity to purchase, though her husband may disagree to it. *Co. Litt.* 3. *a.* 356. b. — Barnfather v. Moffat. Doug. 435.

" But it is to be observed, that this distinction now men- " tioned between the lessee and assignee applies only to the " case of express *covenants in deed*; for it differs in the case " of covenants which are collateral."

*For if the lessee assigns, for the breach of any *express covenant*, this action will *lie against the lessee or his executor*, or against the assignee, for a breach committed by the assignee after assignment, and *after the lessor had accepted rent from the assignee*; but it will lie for a breach of a covenant in law, or which is collateral, *against the lessee only*. — Batchelor v. Gage. Sr W. Jones. 223. Cro. Car. 188. S. C.

*[292]

10. " Covenant will lie against an assignee *of part* of " the thing demised."

* As where the plaintiff demised two houses with covenant on the part of the lessee for himself and assigns to repair; he assigned *one of them*, and for not repairing, the lessor brought covenant against the assignee, and the action was held well to lie. — Konan v. Kemise. Sir W. Jones, 245. Longham v. King. Cro. Car. 221. S. C.

11. " How

11. "How far *actual possession* is necessary to enable the "lessor to maintain this action against an assignee, it has "been decided."

Walker v. Reeves. Mich. 22 G. 3. B. R. quot. Doug. 444.

That by the assignment the title and possessory right passes, and the assignee becomes possessed in law. That as therefore an assignee is only liable while in actual possession, that if he assigns over, before a breach, though *his* assignee has not taken actual possession, yet that he (the first assignee) is not liable to an action of covenant. As here, where the defendant was the assignee of the original lessee, and covenant being brought against him for rent reserved on the lease, he pleaded, "That, before the rent became due, he had assigned all his interest in the premises to one *Rigg*, who, by virtue of such assignment, entered and was possessed. The plaintiff replied, that at the time when the rent became due, the defendant *remained and continued in possession, absq. hoc*, that *Rigg* had entered, *&c.*; and on demurrer it was held, That the assignment being admitted, the actual possession was not sufficient to charge the first assignee, the possession in law being in the second assignee by virtue of the assignment.

Eaton v. Jacques. Doug. 438.

But where the defendant was *a mortgagee*, and the mortgage was made in the form of an assignment of all the lessee's term (which should regularly have been by an underlease,) it was adjudged that the mortgagee could not be sued as assignee, he having never taken actual possession, and even though the mortgage had been forfeit; for the mortgage is only conditional, a security for money, *not an actual transfer of property*.

Spencer's case. 5 Co. 17. 3 Res. [293]

12. If a man leases sheep, or any thing personal, and the lessee covenants for himself *and his assigns* at the end of the time to deliver up the sheep or things so let, or pay such a price for them: if lessee assigns, this covenant shall not bind the assignee: for it is but a personal contract, and wants such privity as is between the lessor and the lessee and his assigns, by reason of the reversion.

Bally v. Wells. 3 Wils. 25.

But it was resolved in this case, That a lease could be made of *tithes* with covenants which would extend to and bind the assignee: the covenant was, "That the lessee, his executors, administrators, or *assigns* would not let any of the farmers of the parish of *Monkstown* have any part of their tithes," upon which an action was adjudged to lie against the assignee.

Boardillon v. Dalton. Espin. N. P. Cas. 234.

13. Where a bankrupt was possessed of a lease, and which passed of course under his assignment to his assignees, it was ruled, that notwithstanding such assignment, as the assignees never took possession, they were not liable, as they were not bound to take possession, and they could only be charged by reason of the possession.

2. Of

8. OF COVENANT BY THE ASSIGNEE.

1. Covenants in law, which run with the land, shall extend to the *assignee*, who may maintain this action on them. As upon the words "demise and grant," the assignee shall have a writ of covenant if ejected; for as the lessee or assignee have the annual profits in return for rent, therefore for the loss of these he is entitled to a compensation from the lessor. — Noke's case, 4 Co. 80. Spencer's case, 5 Co. 71. 4 Rep.

2. "Assignees who come in *by act of law* shall have the "benefit of these covenants, and maintain this action." — 5 Co. 17. a.

As tenant by *statute merchant*, *statute staple*, or *elegit*, or he who purchases a lease for years sold under an execution; all these are assignees. So is tenant by the courtesy; so the husband of *feme* lessee for years who survives: all of whom may maintain this action as assignees.

3. "At common law no grantee or assignee of a reversion "could take the benefit or advantage of a condition for re-entry. It was therefore enacted by statute 32 *H.* 8. *c.* 34. "That all persons grantees of the reversion of any lands "from the king, or grantees or assignees of any common "person, the heirs, executors, successors, or assigns, shall "have like advantage against the lessees by entry for non-"payment of rent, or for waste, or other forfeiture, as the "said lessors or grantors themselves had." — Co. Litt. 215. a. Litt. s. 347.

On this statute it is to be observed,

1. That as the words of the statute are against *lessees* it shall not extend to *gifts in tail*. — Co. Litt. 215. a.

2. That the assignee of *part of the estate in reversion*, or of a grant for years of part of the reversion in fee, may take advantage of the condition. — Ibid.

*3. But the assignee of *part of the reversion* shall not take advantage of the condition; as if there be lessee of three acres, and the reversion is granted of two of them, the grantee shall not have advantage of the condition, for it is entire, and cannot be apportioned. — Co. Litt. 214. b. 294.

4. Whoever comes in by act of the party, as by bargain and sale of the reversion, is an assignee within the act; but it is otherwise where one comes in by act of law, as the lord *by escheat*, or to one who is in of another estate. — Ibid.

5. The grantee shall not take advantage of a condition before he has given notice to the lessee, but he may of a covenant. — Ibid. Cro. Jac. 494.

6. The

Ibid. 6. The grantee or assignee shall only take advantage of such conditions as are for the benefit of the reversion, like those put, as for waste, non-payment of rent, &c.; but not for paying a sum in gross, as delivery of corn, or such like.

2 Show. 134. 7. The assignee of the lessor may maintain covenant against the lessee after the lessee had assigned, and he had accepted of rent from the assignee; for such is within the statute.

Sir James Brett v. Cumberland. Cro. Jac. 521. So also the assignee of the reversion, who hath accepted rent from the assignee of the lessee, shall nevertheless have covenant against the executor of the lessee, and for a breach of covenant done after the assignment: for it is a covenant in fact, and runs with the land, and the lessee by his own act shall not discharge himself.

Glover v. Black. Salk 185. 8. It was formerly an opinion, (*Yelv.* 222. *Hob.* 178.) that the surrenderee of a copyhold was not an assignee within the statute: but modern cases are otherwise; that the surrenderee of a copyhold reversion may bring debt or covenant against the lessee within the equity of stat. 32 *H.* 8., for it is a remedial law, and no prejudice can come to the lord.

Barker v. Beardwell. Show. 4. 9. Though by the custom of *London* an apprentice may be assigned, yet the assignee cannot have covenant on the indenture of apprenticeship: for there cannot be an assignee by custom, and he is no party to the contract.

3. OF COVENANT BY OR AGAINST THE HEIR OR EXECUTOR.

F. N. B. 343. [295] 1. "Covenants real, or such as are annexed to the estate, "shall descend, and the action be brought either by or "against the heir or executor, according to the estate and "time of the breach."

Watson v. Walsh. Taunton Lent. Ass. 1785 MSS. And where the covenant was to use the land in an husband-like manner, and to deliver it in like condition, and the action was by the executor of the landlord against the tenant; it was ruled by Justice *Buller*, That this was a covenant which ran with the land, and that so the executor might sue on it.

"As to the *estate*, the *heir* shall have the action by reason "of the reversion and injury to it."

Lougher v. Williams. 2 Lev. 92. Skinn. 305. S. C. As where the lessee for years covenanted to repair and leave in repair, it was held, That the heir should have an action of covenant on this, though not named; for it was a covenant which run with the estate, and so should go with the reversion to the heir.

Vivian v. Campion. Salk. 141. So where the plaintiff declared on a covenant to repair, as heir to his ancestor, who died the 10 *W.* 3. and the breach was laid on the 3 *Ann.* *and for ten years before*, which included

included the time the ancestor was living; and objection being taken for thus including the time of the ancestor, it was over-ruled by *Holt*, who held, That if the premises were out of repair in the ancestor's time, and continued so to the time of the heir, that it was a damage to the heir, and that he should recover, not with reference to the length of time that the premises were out of repair, but as much as should be sufficient to put them into repair.

2. As to the *time* of the breach, the action is given to the *executor*, as in this case:

The plaintiff, as executor, declared, that the defendant had sold to the plaintiff's testator certain lands, and covenanted with him, his heirs and assigns, that he should enjoy against him and Sir *Philip Vanlore*, and all claiming under them, and assigned a breach that one claiming under Sir *P. Vanlore* had ejected his testator: it was objected that the action should have been brought by the heir or assignee: but it was held, That the eviction being in the lifetime of the testator, he could not then have heir or assignee, and so the action belonged to the executor. But *quære*, if the reason might not also be, That as the purchase was out of the personal estate of the testator, and the damages recovered would belong to it, that therefore the *executor* should bring the action? Lucy v. Levington. 2 Lev. 25.

2. The action of covenant lies *against* the heir or executor also, according to their estates.

* 1. Executors or administrators who come to any term of lands or tenements, as such, are bound by the covenants which run with the estate, as belonging to the personal property of the testator or intestate. Hob. 188. infra. *[296]

As if the lessor covenants with the lessee to make him a new lease at the end of his term, and the lessee dies, his executor may have covenant on this, though not named. Chapman v. Dalton. Plowd. Com. 286.

"Where lands come to an executor or administrator, they "may be charged for a breach in their own time, as non-"payment of rent, or with an action of covenant, either in "that right or as assignees; but there is this difference:" Per Lee, Chief justice in Lyddell v. Metcalf. 1 Wils. 4.

That if the plaintiff declares against them *as assignees*, they are charged as tertenants, and the judgment is *de bonis propriis*. Tilney v. Norris. Salk. 309.

But if the action is brought against them, as executors or administrators, the judgment shall be *de bonis testatoris*, even where the breach has been committed in their own time; as for repairs, *ex. gr.*: for it is the testator's covenant which binds the executor, as representing him, and he therefore must be sued by that name. Buckley v. Pirk. Salk 317. Colins v. Thorough good. Hob. 188.

2. "But

4. "But covenants merely personal, descend exclusively to the executor or administrator, and covenant lies only "against them."

Bro. Abr. Cov. 12. As if *A.* covenants that *B.* shall serve *D.* as an apprentice for seven years, and dies, and *B.* departs within the time, covenant will lie against the executor of *A.* though not named.

6. OF COVENANT BY HUSBAND AND WIFE.

By statute 32 *H.* 8 *c.* 28. it is enacted, "That in leases "for life, or for years, of the wife's land, the wife shall be a "party to the lease, and the reservation be to her and her "heirs; and therefore in covenant on such leases the wife "should join."

Bulmer v. Lain. 2 Mod. 217. But where the covenant is to baron and *feme*, the husband alone may bring the action.

Alsbery v. Walby. 1 Stra. 239. And where the lease was of land, of which the wife was tenant in common with another, and the husband and wife brought the action, it was held, That the wife might or might not join in the action.

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5. OF COVENANT BY TENANTS IN COMMON.

In actions personal, tenants in common shall join: they therefore should join in an action of covenant.

Kitchen v. Buckley. 1 Lev. 109. Sir T. Raym. 70. S. C. Tenants in common of a *reversion*, on a lease for years, shall join in covenant for not repairing: for it is in the personalty merely.

I shall now proceed to consider the cases under the head of Pleadings in the action, premising the following cases as to the *persons* who should bring the action.

1 Roll. Ab. 517. 1. "Where the action is founded on an *indenture*, the per- "son bringing the action must be a *party* to the deed, or he "cannot maintain the action."

Gregg v. Horne. Salk. 197. As where in covenant the plaintiff declared, that *A.* being arrested at his suit, the defendant, in consideration that he would order the bailiff to let *A.* go at large, covenanted with the plaintiff to bring in the body of *A.* and deliver him to the bailiff on such a day; and on *oyer* the deed appeared in *hæc verba*: "*I* (the defendant) do promise and engage my- "self to bring in the body of *A.* and deliver him to *B.* (the bailiff) on such a day." On demurrer, it was held that the plaintiff should not have this action, he being no party to the deed; for though covenant may be brought on a deedpoll, in which no person certain is mentioned, but generally, "To all whom it may concern;" yet a person must be named in a deed indented, or he cannot have an action on it.

But

But where a deed began "it is agreed," &c., and the parties' names were not mentioned in the body of the deed, but at the end was "in witness whereof we have hereunto set our hands and seals," and *both parties signed and sealed it*, it was held that it was a sufficient naming in the deed, and that an action of covenant lay on it. Nurse v. Frampton. Salk. 214.

2. "Wherever a covenant is for the benefit of any per-"son, he must take notice and advantage of it at his own "peril."

As where there was a covenant by the defendant (lessee) "to permit the plaintiff (lessor) to sow clover among the de-"fendant's barley;" and the plaintiff assigned a breach, that the defendant had sowed the barley *without giving him notice*. The defendant pleaded, that he *had not prevented* the plaintiff; on demurrer, the plea was held sufficient, for the defendant was only bound by his covenant *to permit*; and the notice should have been taken by the plaintiff, for whose benefit the covenant was. Hughes v. Richman. Cowp. 125.

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III. OF THE PLEADINGS.

1. PLEADINGS ON THE PART OF THE PLAINTIFF.

1. "The declaration in this action should set out ex-"pressly, that the covenant was made *by deed*."

For where the plaintiff declared in covenant, "That the defendant *per scriptum suum factum apud* Westminster, granted to the plaintiff," &c.: this was held to be error; for there were no words which imported it to be a deed, without which the action could not be maintained. Moore v. Jones. 2 Stra. 814. Cro. Eliz. 517. S. P.

It was formerly held, That where the plaintiff so declared on a deed, he should always *make a profert* of it, and that the court could not dispense with it; for the defendant had a right to it by law, and this was the case, though the deed appeared to be lost, or to be in the defendant's possession. Thoresby v. Sparrow. 1 Wils. 16. 2 Stra. 1186. S. C.

But now the plaintiff may declare that the deed has been lost by time and accident, and the *oyer* shall be dispensed with. Read v. Brookman. 3 T. Rep. 51.

"But in declaring, the plaintiff *should not set out the whole* "*deed at length, or superfluous parts.*" Dundas v. Lord Weymouth. Cowp. 665.

As in covenant on a lease, it is sufficient to say, "That the defendant had, by indenture, demised certain premises to the plaintiff (without naming them) subject, among other things, to such a proviso," and then state the covenant and breach. This was by the order of Court. Price v. Fletcher. Cowp. 727. S. P.

2. "Where the covenant is general, a general assignment "of a breach is sufficient."

Farrow v. Chevalier. 1 Salk. 139.

As where the covenant was, Not to buy or sell for two years, without leave of the plaintiff; and the breach assigned was, "That the defendant *diversis diebus et vicibus* between such a day and such a day, had sold to *A.* and several other persons unknown, goods to the amount of 100*l.* After a verdict, It was moved in arrest of judgment, That the breach was uncertain as to times and persons; but it was held to be sufficient as a general assignment; for it was so described, that a recovery in this might be well pleaded in bar to another action for the same cause.

"But the most general assignment is *in the words of the "covenant itself.*" As,

Muscot v. Ballett. Cro. Jac. 369. 9 Co. 60

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*If the lessor covenants that he is seised in fee, or hath full power to lease. In declaring in covenant, it is sufficient for the plaintiff to say, "That lessor *was not seised in fee*, or *had not full power to lease.*"

Hancock v. Field. Cro. Jac. 170. S. P.

And then the defendant must shew that he had full power to lease, or was seised in fee, *by shewing* what estate he had at the time of making the lease, which then puts the plaintiff upon shewing a special title in somebody else.

"But where the covenant is broken *by some act* of a third "person, it is not sufficient to state the breach generally, "for *that act* should be set out; but it should seem that it "might be sufficient to state that breach in the replica-"tion."

Nicholls v. Rullen. 1 Lev. 83. 1 Keb. 379. 413.

As where the covenant was to save harmless from all suits and lawful evictions, the defendant pleaded performance. The plaintiff replied, that one *J. S.* took out an *hab. fac. possession, debito modo exeunt, &c.*, and by virtue thereof expelled him. The defendant demurred, and had judgment; for *debito modo is not sufficient*, without shewing particulars. The *hab. fac. possess.* always recites the term of the judgment, and that it at least should be set out.

3. "Where the plaintiff assigns a breach, it should be "so set out, that it may appear clearly to be within the "covenant."

Wingfield v. Sherwood. Stile 5.

As where the defendant covenanted in a lease, that he would not cut down *more timber than was necessary for the repairs* of buildings. The plaintiff (lessor) assigned a breach that the defendant had cut down trees *to the value of* 10*l.* and converted them to his own use; and after a verdict, the judgment was reversed for error: for there should have been an averment, "That he had cut down more than was necessary for repairs;" for as there assigned, it was not within the covenant.

"For such assignment of the breach was not within the "words of the covenant, and so was bad for the uncer-"tainty;

"tainty; for where the covenant *may not have been broken*, "the declaration assigning the breach in that manner is ill."

As where the covenant was by the defendant, that he, his executors, administrators, or assigns, would repair a mill, and breach assigned the not repairing it by the defendant, his executors, administrators, and assigns. On demurrer the declaration was held to be bad; for the breach should be in the disjunctive, "*or* his assigns:" for if any of them did repair, the action would not lie. Colt v. Howe. Cro. Eliz. 348. [300]

4. "Where there is a *proviso* in the deed, defeating the "covenant, the plaintiff need not set it out in his declara- "tion, but leave the defendant to plead it."

As on a covenant to deliver so much saltpetre before the 20th of *October*; and there was a proviso, that if defendant *was prevented by the sea*, that the deed should be void. It was held, that the plaintiff need not state the proviso, as it would be matter of defence for the defendant, of which he might avail himself. Elliot v. Blake. Sir T. Raym. 65.

"But where there is an *exception* making part of the cov- "enant, the plaintiff, in setting out the breach, should also "shew that the breach was not within the exception; for "the declaration is on *the whole covenant*, and the breach "will not be within it unless so set out."

As where the plaintiff declared on a covenant by the defendant, to repair all the pales of a garden then demised, except those to the east side, and assigned the breach, in not repairing *sec. formam conventionis*. This was held well after a verdict; but it was agreed, That it would have been bad on special demurrer, for want of setting out "that the pales were not those excepted." Sir T. Jones. 138.

And *note*, "That if the plaintiff declares on a covenant "which he sets out, and afterwards assigns an inconsistent "breach, if under a *seiz.* it shall be rejected.

As where the plaintiff declared upon articles dated the 30th of December, 1718, not to set up the trade of a baker, from the date of those articles, for so many years, and afterwards assigned a breach, "That defendant did *afterwards*, *to wit*, *first of May*, 1718, follow a trade." This being inconsistent with the articles, was rejected. Hayman v. Rogers. 1 Stra. 232.

5. "Where a covenant is in the alternative; that is, where "the covenantor undertakes for one of two things, breach "should be assigned as to both.

As where the defendant covenanted that he would not take wood without the assent or assignment of the lessor or assigns: it was held not sufficient to say that defendant took wood *without the assignment* of lessor or his assigns; for it might be with *their assent*, and so no breach. Shetwood v. Noon. 1 Leon. 290.

But

Aleberry v. Walby. 1 Stra. 229.

But where the covenant was "to pay or cause to be paid," that the defendant had not paid, was held to assign the breach sufficiently, without saying "or caused to be paid;" for if the defendant had caused to be paid, he had paid.

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"But where the covenant is founded on the contingency "of two things, and *that which shall first happen*, the plaintiff may declare, on a breach arising from the happening "of one of them, without making any mention of the other."

Loggin v. Lord Onslow. 1 Lord Raym. 139.

As where the plaintiff declared on a covenant, whereby it was agreed, that he should deliver to the defendant a mare, and the defendant was to pay for the same twenty guineas, at the death of his mother, *or* day of marriage, which ever should first happen. It was adjudged, That it was sufficient in declaring on the covenant, to state *the happening of one of the contingencies*, without saying that it was the first; and that if even the other had happened first, the declaration was still good; for the delay was the plaintiff's own.

6. "Where the action is for breach of covenant by the act "of a third person, the declaration should set out, that the "breach was by such a person, *under a claim of title, or by "lawful act*; for the covenant on the part of the covenantor "does not extend to the illegal acts of others, who are themselves liable to an action."

Lanning v. Lovering. Cro. Eliz. 917.

As where the lessor covenanted that the lessee should hold the lands discharged of payment of tithes, and the breach assigned was, a recovery of them in an action by the parson. It was held on demurrer, That the breach was ill assigned, because he had not alleged *that the suit was lawful, or the tithes due*; for the covenant did not extend to illegal suits.

"The questions under this head are those which for the "most part arise under the express covenant for quiet enjoy"ment, or the covenant in law under the demise, and an ex"pulsion by a third person."

"The declaration, therefore, should always state the dis"turbance or eviction to be by a person *by claim of title*, and "not of title only but of good and *elder title*, for perhaps the "eviction might be by a person claiming *under the lessee "himself*."

Nokes's case. 4 Co. 80. b.

Therefore where the plaintiff declared on a demise of a house in *London*, and covenant that the lessee should enjoy without eviction from the lessor, or any claiming under him, and breach assigned, "That one *Savery* had recovered the house in ejectment by verdict, and expelled the plaintiff" on demurrer it was adjudged, That although the recovery was by verdict, yet that the plaintiff ought to have shewn

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that

that Savery had elder title: for otherwise the covenant in law was not broken.

"But it is sufficient in such case, to assign the breach "by act of a person claiming by elder title, *without stating* "*what that title is*; for perhaps the plaintiff may not know "the title of the person expelling him: or state that he "evicted him by legal process." 2 Lev. 37.

And therefore, if it appears from the declaration itself that the claim was by elder title, and not under the plaintiff himself, it is good without setting it out as *elder title*. Foster v. Pearson 4 T. Rep 617.

As where the defendant declared on a demise to him for a year, and the breach assigned was, that *J. S.*, who had title *by virtue of a demise made to him of the same land, before that made to the plaintiff*, had entered and evicted him; it was held to be well on motion in arrest of judgment; for the title appeared sufficiently to be an elder one, and not under the plaintiff. Proctor v. Newton. 2 Lev. 37.

"And so where the breach is by *a* person *included in the* "*covenant*, it is not necessary to state any title as to him, "for the action is founded on the covenant itself."

As where the lessor covenanted, "That during the term neither *he, his heirs or executors*, should interrupt the lessee;" and the breach assigned was by entry of *the executors* of the lessor, it was held, That no title need be set out as in them, they being included in the covenant on the part of the lessor. Foree v. Vines. 1 Roll. Rep. 21. Ratcliff's case. 1 Brownl. 80. S. P.

7. How far the breach should be assigned, as affecting assignees, the distinction is settled in this case, *viz.* That where a thing is to be done *by* a man or his assigns, the breach must be in the disjunctive, that it was not done by him *or* his assigns: but where the act is to be done *to* a man or his assigns, it is sufficient to assign the breach, that it was not done to him without mention of his assigns. Smith v. Sharp. 1 Salk. 139.

"But it should seem that the rule here laid down, is only "the case where the action is not against the first covenan-"tee or lessee."

For where the covenant was on a lease to the defendant, by which he covenanted, he, his heirs and assigns, every year, to plant eight crab-stocks; and breach assigned that *he had* not planted such a year; it was held to be well, without mentioning *his assigns*: for the action being against the first lessee, an assignment was not to be presumed. Gyse v. Ellis, 1 Stra. 228.

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So where the defendant covenanted for himself, his heirs and assigns, to pay rent, &c.; and the breach assigned was, that he had not paid, without saying "or his assigns," the Court held the breach well assigned; for they would not presume an assignment. Mayor of London v. Sir Fisher Tench. Mich. 1733. B. R. Buller N. P. 164.

In

Lovelock v. Sorrell. Mod. Cas. 79.

In declaring against an assignee, the plaintiff may declare against him generally as assignee, *without setting out the mesne assignments*, for perhaps he may not know them.

8. "If the plaintiff in declaring in covenant, should state "the estate under which he derives his right to the action. "and he *mis-states* it, it is his error."

Polyblank v. Hawkins. Dougl. 316.

The plaintiff in stating his title in this case, set forth, That one *Strobridge*, who was seized in fee, made the lease in question, and that on his death the estates in reversion descended to the wife of the plaintiff, as his heir at law, whereupon he (the plaintiff) became *seized of the reversion, as of freehold, in right of his said wife*. On demurrer, the declaration was held to be ill; for from his own shewing, the estate he had was *in him and his wife*, in her right as of *fee*, and not as stated.

Aleberry v. Walby. 1 Stra. 229. 2 Ras.

But it was agreed in this case, that the plaintiff *need set out no title, but declare generally* "*quod dimisisset*:" and it was there settled, That where he had set out the title *imperfectly*, (as in not regularly setting out a descent, by omitting the person under whom plaintiff claimed,) that this was surplusage, and could be rejected. But, if the title had been stated *wrong*, as in the last case, it had been error.

9. "In covenant, to pay a sum certain, there can be no "apportionment of demand, for the breach must follow the "covenant, which is entire."

Rea. v. Burnett. 2 Lev. 124.

Therefore, where the plaintiff declared on a charter-party, whereby the defendant covenanted to pay the plaintiff so much, *viz.* 3*l. per ton* for goods imported, and assigned a breach in not paying for so many tons, *and one hogshead*: on demurrer, the breach was held to be ill assigned in charging for the hogshead, the covenant being only so much *per* ton. But *aliter*, had it been to pay so much *per* ton *secundum ratam*.

Needler v. Guest. Allen 19.

So where the covenant was, that the defendant was to take the plaintiff for his clerk, and allow him 2*s. per* quire for what he should copy; and breach assigned the non-payment for four quires and *three sheets*; judgment was in this

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case reversed; for there could be no apportionment for the three sheets.

Incledon v. Cripps. Salk. 658.

But where the plaintiff so claims more than the contract will support, he may enter a *remittitur* for what he has claimed too much, and take judgment for the rest, where the demand is not settled to a certain amount by the deed, but depends on something extrinsic; for if the demand is so settled, as if it be a covenant to pay 20*l.*, there can be no *remittitur*.

10. Where

10. Where there is a joint covenant *by* several, *all* should join in the action, or on demurrer on *oyer* it will be bad. Vernon v. Jefferyes. 2 Stra. 1146.

But if any named in the indenture have not sealed it, they should be excluded by an averment to that effect. But advantage must be taken by pleading in abatement, if the action is brought *against* part only of the covenantors. S. C. Buller N. P. 158.

11. *Covenant for non-payment of rent* must be brought where the lands lie, though the rent be made payable in another place. As here, where the lands lay in *Ireland*, and the rent was reserved to be paid in *London*, it was adjudged, That the action should be brought in *Ireland*. Barker v. Damer. 1 Salk. 80. 1 Show. 191. S. C.

But debt for rent where it may be brought. *Vid ante* 212.

12. "Where the plaintiff cannot sue on a breach of "covenant, without some previous circumstances to be "performed, the declaration should aver the performance "of them."

As where the defendant covenanted to satisfy the plaintiff for all sums of money which the defendant's son should embezzle while apprentice to the plaintiff, *within three months after proof and request made*, the declaration laid only the embezzlement and request, but not the time of proof. The plaintiff had a verdict; but judgment was arrested for this fault. Crookhay v. Woodward. Hob. 217.

2. OF THE PLEADINGS ON THE PART OF THE DEFENDANT.

These are, 1st Performance. 2. Other Covenants in Bar. 3. Nil habuit in Tenementis. 4. Non est Factum. 5. Entry and Eviction. 6. A Release. 7 Accord and Satisfaction. 8. A Tender and Refusal, 9. Levied by Distress. 10. Infancy. 11. Bankruptcy.

1. Of the Plea of Performance. [305]

As to which plea. 1. "If all the covenants in an indenture are in the affirmative, the defendant may plead *per-* "*formance generally*; but if any are in the negative, he must "plead to them specially (for a negative cannot be perform-"ed) and to the rest generally." Co. Litt. 303. b.

And if he pleads otherwise on demurrer, the defendant shall have judgment. Croswell v. Peachy. Cro. Eliz. 691.

Therefore where the defendant covenanted by charter-party, that he would sail from the *Thames* to such a place in *Spain*, and the words were "That he *decederet procederet, et non deviet*;" he pleaded performance generally and it was held ill; for there was an express negative covenant Laughwell. v. Palmer. 1 Sid. 87.

"that

" that he should not deviate ;" to which he should have pleaded specially ; for though he sailed from the *Thames* to *Spain*, he might have deviated.

Ellen v. Bote. Alleyn 72.

And the case is the same in debt on a bond for performance of covenants. Performance is a bad plea ; for some of the covenants might be negative.

Co. Litt. 303. b.

2. " So if any of the covenants is in *the disjunctive*, he must " *shew which* he has performed."

Show 1.

" So where the covenant is for the act of a stranger, per- " formance generally is a bad plea, it should shew how per- " formed."

2. Of the plea of other covenants in bar.

1. " A covenant in one indenture shall not be pleaded in " bar to a covenant in another indenture, except such be a " defeasance of the former ; for perhaps the injuries may " not be equal."

Gawden v. Draper. 2 Vent. 217.

As where the plaintiff declared, That the defendant, by indenture, covenanted to pay to the plaintiff 300*l. per ann.* so long as his wife should live with and be supported by the plaintiff, and the action was for one quarter's salary. The defendant pleaded, That afterward, there was another indenture made between the same parties, that whenever the said defendant and his wife should come and cohabit together, that the allowance should cease ; and pleaded further, that they did cohabit. On demurrer, it was ruled to be a bad plea, and that the defendant should have an action on his indenture, but could not plead it in bar of a covenant in the other.

Clayton v. Kynaston, and Lacy v. Kynaston. 1 Salk. 573 and 575.

*[306]

* But a defeasance by another deed may be so pleaded in bar ; but the second deed must appear to be *intended to operate as a defeasance*, and *contain proper words* for that purpose, " as reciting the first deed, and declaring it to be there- by void."

2. " But one covenant in a deed may be pleaded in bar " to a covenant *in the same deed* ; for the sense of the par- " ties is to be collected from the whole of the deed."

Johnson v. Carre. 1 Lev. 152.

As in covenant for rent, the defendant was allowed to plead another covenant in the same indenture, that he (as lessee) might retain so much of the rent for repairs and charges.

3. Of the Plea of Nil habuit in Tenementis.

Heath v. Vermeden. 2 Lev. 146.

" In this action the defendant cannot plead *nil habuit* " *in tenementis* ; for the indenture is an estoppel."

" So

"So neither shall the defendant plead a plea which "amounts to *nil habuit in tenementis*, though not so in terms."

As where the plaintiff declared, as assignee of the reversion from one *Palmer* who had by deed demised the premises in question to the defendant for twelve years then unexpired; the defendant pleaded, That ten years before the making of the lease to him, that *Palmer* had sold the reversion in fee to one *Bragg*, and traverses the seisin of *Palmer*, as alleged by the plaintiff. To this plea there was a general demurrer, and the Court resolved, 1. That the defendant's plea was tantamount to *nil habuit in tenementis*; for it denied the seisin in fee in *Palmer*, who had demised to him by deed, and so was bad in law. 2. That the plaintiff, who was assignee, should have the benefit of this estoppel, which runs with the land. 3. That the estoppel need not be replied, but should be taken advantage of on demurrer, and that the plea in the present case was bad on a general demurrer. Palmer v. Ekins 2 Stra. 817.

4. Of the Plea of Non est Factum.

1. Where the defendant pleads *non est factum*, he cannot controvert the lessor's title; for the issue is only on the existence or goodness of the deed. Friend v. Eastabrook 2 Bl. Rep. 1152.

2. "The defendant may under this plea, shew that some "of the covenants in the deed have been altered or erased, "or he may plead it;" for if any covenant be altered or erased, the whole deed is discharged: for the deed is a complication of all the covenants, so that by changing any, the deed remains no longer the same. 2 Co. 28.

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5. Of the Plea of Entry and Eviction.

"This is a good plea in covenant, but it must be pleaded "to be such *as disables the defendant from performing his cov-* "*nant.*"

For where the lessee covenanted to build an house upon the land within ten years, and he assigned the term: on action brought for non-performance the defendant pleaded, That the lessor had entered and held possession for part of the ninth year. *Per Cur.* The defendant should have shewn that the lessor entered by wrong, and held him out, so that he could not build; for perhaps the lessor's entry might have been lawful, as for non-payment of rent, which in fact was the case. Barker v. Fletwell. Godb. 69, 20.

So where the covenant was by the lessee to drain such water out of the land before such a day, and on covenant for non-performance, he pleaded, that before the day lessor had Carril v. Read. Cro. Eliz. 374.

had entered and expelled him, and continued in possession till after the day. This was adjudged to be a bad plea; for it was a collateral act, and he should have set out "that he was *prevented by the lessor*."

"For if the covenant *could be performed*, an entry shall not "excuse the non-performance."

Snelling v. Stagg and Andrews. Mich. 26. Car. 2. N. B. Buller N. P. 165.

As where on a demise of a messuage with the appurtenances, the defendants covenanted to repair, and breach assigned in not repairing; the defendant pleaded an *entry by the plaintiff* into the *back yard of the messuage*. The court held this to be no plea; for an entry into the back yard could not suspend the covenant to repair the messuage, of which he was still in possession, though by such entry the rent was suspended.

6. Of the Plea of a Release.

Co. Litt. 292 b. Eccles v. Lambert. Alleyn 38.

If *before a covenant is broken* the covenantee releases to him all *actions, suits*, and *quarrels*, this doth not discharge the covenant itself; because at the time of the release there was no debt, duty, or cause of action.

But in that case, a release *of all covenants* is a good discharge of the covenant before it is broken.

Rogers v. Payne. 2 Wils. 376.

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But wherever a discharge is pleaded in the nature of a release, the defendant must plead it to be *by deed*, or it will be bad; for as the covenant is by deed, by deed only shall it be discharged. *Blake's case, 6 Co. 44, a.*

Middlemore v. Goodall. Cro. Car. 503. 1 Roll. Abr. 411.

And *note*, That where a covenant runs with the land, and the lease has been assigned, the covenantee cannot release a covenant after it is broken, and action has been brought by the assignee: for the right of action is then attached in his person. But if covenantee had released before a breach or action brought, it had barred the assignee even for a breach in his own time.

7. Of the Plea of Accord and Satisfaction.

6 Co. Blake's case, 43.

1. "*Accord and satisfaction* is another good plea in cove- "nant: for though this action is founded on a deed, and a "deed can only be discharged by a deed, yet this is a good "plea; for it is not pleaded in discharge of the *covenant* it- "self, but only in discharge of the *damages*, for the covenant "remains."

Alden v. Blague. Cro. Jac. 99.

As when to breach assigned on a covenant, the defendant pleaded an accord or agreement, "that the plaintiff should "take thirty shillings in satisfaction of all damages:" it was on demurrer ruled to be a good plea, for the reason above: for in every action where damages are demandable by way of amends, accord is a good plea in discharge.

2. "But

2. "But it is only a good plea *where there has been an actual* "*breach*; for not till then are damages claimable."

For where the plaintiff declared, that in consideration that he would permit *S. P.* to enjoy a farm at *Chipsham* for one year, the defendant covenanted to pay the rent of 72*l. per ann.*, and also 200*l.* then in arrear; and the breach assigned was, the non-payment of the rent. The defendant pleaded, that *before any cause of action did arise on the covenant*, that it had been agreed between him and the plaintiff, that the plaintiff *should take* 30*l. in discharge of all covenants*; which the plaintiff had accepted. On demurrer, this plea was held to be a bad one, for at the time there was no covenant broken, and accord and satisfaction is no good plea, except in discharge of damages *for a covenant actually broken, or damages sustained.* Snow v. Franklin. Lutw. 358.

8. "Another plea is that of *tender and refusal.* But in this action the damages, not the debt, being the thing in demand, it need not be pleaded with an *uncore prist.* Carter v. Downish. 1 Show. 137.

*9. In covenant for non-payment of rent, the defendant cannot plead *levied by distress*; for that is a confession that it *was not paid at the day*, to which time the breach refers; but *riens in arrere*, or *payment at the day*, will be a good plea. Hare v. Saville. 2 Brown. 223. *[309]

10. Infancy is another good plea in this action; for an infant cannot bind himself by deed, except for necessaries. This action was covenant against an apprentice, brought on the indenture, and held not to lie, he being an infant. Gilbert v. Fletcher. Cro. Car. 129.

11. If the defendant has leave to plead double, under statute 4 & 5 *Ann. c.* 16. he shall not be allowed to plead inconsistent pleas, as *non est factum*, and a condition precedent. Fish v. Miller. Gilb. Rep. 123.

12. The plaintiff and defendant being joint lessees of a lease, the plaintiff released his part to the defendant, who covenanted to repair, pay rent, and indemnify the plaintiff. On covenant brought, and breach assigned as to all, the defendant *pleaded bankruptcy*; it was adjudged, That this, being an *express* and collateral covenant, was not discharged under the bankruptcy and certificate, for it was not a *debt* due at the time of the bankruptcy, and so could not be proved under it. Mayor v. Steward. 4 Burr. 2444.

4. OF THE EVIDENCE IN THIS ACTION.

1. "Where the plaintiff declares in covenant on any deed, "he shall not be allowed to go into evidence of any matter "out of the deed to support his action; for the proof must "correspond with the declaration."

As

Littler v. Holland. 3 T. Rep. 590.

As where the plaintiff declared on certain articles, whereby he undertook to build two houses for the defendant by a certain day *(the 1st of April,)* in consideration of which the defendant undertook to pay the plaintiff 500*l.*, and breach assigned in the non-payment, and averred performance, the defendant pleaded that the plaintiff had not finished the houses by the 1st of *April*, on which issue was joined: at the trial it appeared that the parties had, by a subsequent parol agreement, enlarged the time, and that the work was finished within the time so enlarged, this evidence was held to be bad to support the declaration, and the plaintiff was non-suited; which the Court on application refused to set aside.

2. "If the plaintiff assigns a breach generally, and afterwards narrows it to a particular matter, he shall be confined to give his evidence to such particular matter only."

Harris v. Mantle. 3 T. Rep. 307. *[310]

*As where the breach assigned was, "That the defendant had not used the demised premises in an husband-like manner; but, *on the contrary, had committed great waste, spoil and destruction*; it was adjudged that the evidence should be confined to the commission of waste, &c., and that the plaintiff should not be allowed to go into evidence of the not using the land in an husband-like manner, if that did not amount to waste.

Bell v. Harwood. 3 T. Rep. 308.

3. Where the question is respecting the time of a demise from *A. B.* where both parties admit his title, he may be a witness; for this verdict cannot be given in evidence in any action, either for or against him.

Having now considered the nature of this action, and the pleadings and evidence on it, the subsequent proceedings now alone remain, the Verdict and Judgment: but I shall previously mention this case relative to payment of money into court.

Fullwell v. Hall. 2 Black. 877. Walmouth v. Houghton. 2 Barn. 229.

Upon a general count in covenant, money cannot be paid into court; for the action is for *damages*, which are uncertain. But on a special count for a liquidated sum, as for rent, or for 5*l. per* acre for ploughing meadow, the Court will allow it.

5. OF THE VERDICT AND JUDGMENT.

Vivian v. Campion. Salk. 141.

1. Where covenant is brought, and breach assigned, the not repairing of houses according to covenant, *the damages ought to be such as are sufficient to put the premises in repair at* the time of the action brought; and to that purpose they ought to be applied.

Farrer v. Snelling. 1 Roll. Rep. 351. 2 Bulst. 155.

2. In covenant for non-payment of rent at divers days, which amounts to so much, and in the declaration the sum

is mis-cast, it is not error, but the plaintiff shall have a verdict for so much as is really in arrear.

3. Where the breach was assigned in two covenants, and it appeared that for one the plaintiff had no cause of action, and for the other a good cause of action, issue being joined on both, and a *general verdict found*, and damages entire, the judgment was arrested; for, for part, the plaintiff had no cause of action. Anon. Cro. Eliz. 685.

4. If covenant be brought against *two*, and there be judgment by default against one, and the other pleads performance, which is found for him, the plaintiff shall not have judgment against the other; for, on the whole, the plaintiff has no cause of action. Porter v. Harris. 1 Lev. 63.

*5. In covenants perpetual, if they be once broken, and an action brought on the covenant and judgment for the plaintiff, this judgment shall stand; and in case of a future breach, plaintiff may have a *scire facias* on this judgment without bringing a new writ. Swan's case. Cro. Eliz. 3. *[311]

And after a judgment by default, a writ of inquiry executed, and damages assessed, the defendant may move in arrest of judgment. Chauntflower v. Priestly et al. executors. Cro. Eliz. 914.

And *note*, That where there is a special penalty in a covenant (as a charter party, *ex. gr.*) the plaintiff may either go for the penalty and rescind the contract, or bring an action on the case for breach of contract, and waive the penalty; in which case he may recover more than the penalty. Winter v. Trimmer. 1 Bl. Rep. 395.

CHAPTER

CHAPTER IV.

The Action of Assault and Battery.

Finch's Law. 202.

1. "ASSAULT is the unlawful setting upon the person "of any one, *by the offer or attempt to beat*; though without "touching the person: as by raising a stick or fist to strike, "making a blow at a person, but missing him: so lying in "wait, besetting one's house, is an assault in law."

1 Hawk. P. C. 133.

Anon. 9 Mod. 3.

But *words alone* will not make an assault, though, what might otherwise be deemed an assault, words might explain away: as if a person lays his hand on his sword, as to draw it, this might be deemed an assault; but when the party added, "If this was not assize time I would not take such language;" these words explained away the implied assault.

"Battery is the Actual commission of violence to the per- "son, as, by beating, striking, pushing violently, or doing "any such injury in an angry or spiteful manner."

"Under this head too falls *mayhem*, which is a more hei- "nous kind of battery; that of wounding and depriving a "person in consequence of it, of any member necessary for "his defence: as an arm, hand, eye, *&c.*"

In this action I shall consider, 1. What shall constitute an Assault and Battery. 2. What shall excuse it. 3. The Pleadings on the part of the Plaintiff and Defendant. 4. The Evidence. 5. The Verdict, Damages and Costs.

1. WHAT SHALL CONSTITUTE AN ASSAULT AND BATTERY.

1. "The act causing the injury to the plaintiff need not "proceed from the *immediate assault or act of the defendant*; "for any wanton act by which another person or thing *causes* "a battery, will support this action."

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Scott v. Shepherd. 3 Wils. 403. 2 Bl. Rep. 892. S. C.

As where the defendant threw a lighted squib into the market place, which being tossed from hand to hand, *by different persons*, at last hit the plaintiff in the face, and put out his eye. This action was adjudged to lie against the defendant, though the injury was not caused by the immediate act of the defendant himself.

So

So if a person pushes a drunken man against another, and hurts him, this is actionable, as an assault and battery. But if the defendant intended to do a right act, as to assist him in going along the street without help, and in so doing an injury is done, he will not be answerable. — Short v. Lovejoy. coram Lee C. J. G. Hall. 1753. Buller N. P. 16.

2. "To constitute an assault the injury should be *wilful*, "*or proceed from want of due care*; for if not wilful, and "done without default, the action will not lie." As if a soldier at exercise, by accident hurts his companion, it is not actionable; but it would be otherwise, if it proceeded from neglect, or want of due care. — Weaver v. Ward. Hob. 134.

As if by a sudden fright an horse runs away with his rider, and runs against a man, it is no battery, and this may be given in evidence on the general issue; *but if any person had whipped the horse*, and made him run away with the rider, and hurt a third person, or the rider himself, *he* would be liable who had whipped the horse. — Gibbons v. Pepper. 4 Mod. 405. Salk. 6. 37. S. C.

3. "Where a person receives a bodily injury in conse- "quence of an act done *by his own consent*, he shall not "maintain this action."

As where two persons played at cudgels by consent, and one hurt the other, it was held to be no battery; for *volenti non fit injuria*. — Dalt. c. 22.

"But in such case the act from whence the injury pro- "ceeds must be lawful.

For where in this action the defendant would have given in evidence that the plaintiff and he *boxed by consent*, from whence the injury proceeded, it was held to be no bar to the action; for as the act of boxing is unlawful, the consent of the parties to fight could not excuse the injury. — Boulter v. Clerk. at Abingdon. 1747. Buller N. P. 16.

And in this case it was held, That if one license another to beat him, such license is void, because it is against the peace; and the plaintiff had in this case a verdict and damages. — Matthew v. Ollerton. Comb. 218.

* And *note*, That if two commit a battery, and one of them dies after issue joined, yet shall the action continue against the other. — Hill v. Tempest. Cro. Eliz. 145. *[314]

2. WHAT SHALL EXCUSE OR JUSTIFY THE DEFENDANT IN THIS ACTION.

1. "Wherever a person is *acting under any authority given to him by law*, that shall be sufficient justification."

As, 1. "If an *officer* has a writ or warrant against a per- "son *who will not suffer himself to be arrested*, he may justify a "beating or even wounding in the attempt to arrest him." — Hawk. P. C. 190.

But

Williams v. Jones. 2 Stra. 1049. Titley v. Foxhall. Trin. 31 G. 2. G. B. Bull. N. P. 19.

But a *battery* cannot be justified by *an arrest only*, it will only justify the assault; for to justify a battery, *resistance* or an attempt to rescue himself out of custody should be shewn, unless it be by way of *molliter manus imposuit*, in which way alone the defendant may justify the beating, without shewing any resistance or attempt to rescue.

Bateman v. Woodcock. Cro. Jac. 372.

And where a person justifies an assault and battery by virtue of a sheriff's warrant, *he need not shew the warrant*; for that must be returned to the sheriff.

Howe v. Planner. 1 Saund. 14.

2. So in the exercise of his office a *churchwarden* may justify taking off the hat or laying hands on a person who is *disorderly in church*, and turning him out for disturbing the congregation; but it must be by a *molliter manus imposuit*.

Lane v. Degberg. Hill 11 W. 3. per Treby. C. J Bull. N. P. 10.

3. So the defendant may justify even a mayhem, if done by him as an *officer of the army*, as a *punishment* to the plaintiff *for disobedience of orders, or other military crime*: and the defendant may give in evidence a petition by the plaintiff to a council of war against him: and if by their sentence the petition was dismissed, it is exclusive evidence for the defendant.

Leeward v. Basely. 1 Ld. Raym. 62. S. C.

4. A man may justify against any one *who assaults his wife, parent or child*, in their defence; so a wife may justify an assault in defence of her husband. A servant may in like manner justify an assault in defence of his master; but a master cannot justify an assault in defence of his servant*: for the master may have an action against the person who beats his servant, with a *per quod servitium amisit*; but the servant can have no such action for beating his master.

*Tamen quære. Vid. 3. Bac. Abr. 568.

Same case, and 1 Hawk. P. C. 130. [315]

5. So one may justify the battery of a person who endeavours wrongfully to *dispossess him of his lands, or to take away his goods*: but in the case of an entry on the lands, it must not be justified as a battery, but as a *molliter manus imposuit*.

Green v. Goddard 2 Salk. 641.

And where the injury is a mere breach of a person's close, the defendant cannot justify a battery *without a request to depart*: but it is otherwise if one breaks down a gate, or enters *vi et armis*; for there it is lawful to oppose force with force.

Hawk. P. C. 130.

6. "*A parent* may give reasonable correction to his *child*; "a *master* to *his servant* or *apprentice*; a *schoolmaster* to his "*scholar*, or a *gaoler* to *his prisoner*." All these, therefore, are special justifications.

7. "Wherever the assault or battery has proceeded from "the plaintiff's own fault, it is a sufficient justification for "the defendant."

W[illiams] v. [illegible]

As where the plaintiff and defendant being at play, the plaintiff thrust his money into defendant's heap; upon which the

the defendant kept it, and then a dispute and struggle took place, which was the assault for which this action was brought. The Court held the defendant justified, and not guilty; for the first fault proceeded from the plaintiff, as so a man might be made a trespasser against his will.

8. Under this head falls the most usual justification in this action. *viz.* "That of *son-assault demesne*, or that the "first assault proceeded from the plaintiff himself."

If the defendant proves that the plaintiff first lifted up his stick to strike him, and *offered so to do*, it is a sufficient assault to justify his striking the plaintiff; for he need not stay till the plaintiff has actually struck him, for he might be disabled by the blow. Bull. N. P. 18.

"But there must be some proportion between the bat-"tery given and the first assault, for every assault, however "small, will not justify an enormous battery."

And the rule is laid down by Lord *Holt*, in this case, who held, That the meaning of the plea of *son-assault* was, *that the defendant struck in his own defence*; so that if A. strikes B. and a scuffle ensues, and the parties close immediately, and in the scuffle A. is even mayhemed by B., that is to be justified under *son-assault*: but if, upon a little blow given to B. he gives a blow in return, which mayhems A. that is not justified under *son-assault demesne*: for the reason why *son-assault* is a good plea in mayhem is, because it might be such an assault as would endanger the defendant's life. Cockcroft v. Smith. 2 Salk. 642.

*Therefore in this case the chief Justice directed the jury to give a verdict for the defendant in a mayhem, the first assault being by tilting the form whereon the defendant sat. S. C. 1 Ld. Raym. 177. *[316]

But if the assault has happened in a *church yard*, *son-assault demesne* will not justify the defendant; for the law so abhors violence in churches or church-yards, that it will not allow a man to strike there even in his own defence. Francis v. Lev. Cro. Jac. 367.

3. OF THE PLEADINGS.

1. OF THE PLEADINGS ON THE PART OF THE PLAINTIFF.

1. The declaration in assault and battery cannot lay the offence on a day certain, and *at divers other days*, and times; for an assault is one individual act, a distinct offence, and cannot be laid with a *continuando*. Michell v. Neal & ux. Cowp. 828.

2. The offence should be charged fully and positively, and not by way of recital, as "*whereas A. B.* on such a day made an assault." This is where the action is by bill in the *King's Bench*. Amyon v. Shore. 2 Stra. 621.

White v. Shaw. 2 Wils. 203.

For in the court of *Common Pleas* such declaration would be good; for in that court the writ being set out in the declaration, helps the want of a positive averment.

Douglas v. Hall. 1 Wils. 99.

But if the declaration is so in the *King's Bench* the defendant should take advantage of it by special demurrer; for it will be good after a verdict.

Newton v. Hatter. 2 L. Raym. 1208. Horton v. Byles. Sid. 387. S. P.

3. For a battery of the wife, the husband and wife should join in the action, and the damages be laid *ad damnum ipsorum*: first, Because the husband is damnified by being put to expense for her cure, and in suing the action: and 2dly, Because the action and damages survive to the wife, to whom the injury had been committed.

Newton v. Hatter. supra.

And therefore, where the action was by husband and wife, for a battery of the wife, and laid *ad damnum ipsius* (*viz.* the husband,) the judgment was arrested; for so the damages would not survive to the wife, they being recovered only to the husband. So if the assault and battery has been committed against *both husband and wife*, he must bring his action alone for *the injury done to himself*; for the wife can not join in an action for an injury done to the husband: and

Cro. Jac. 655. [317]

therefore where a joint action was brought for such battery and damages separately assessed, the writ abated *quoad* the husband.

Newman v. Smith. Salk. 642.

4. The plaintiff, in his declaration in this action, may lay many things in aggravation, for which he himself could not maintain an action: as here, "for making an assault on himself, entering his house and assaulting his servants," &c.

King v. Phippard. Comb. 288.

5. If the defendant pleads *son-assault demesne*, and the plaintiff can justify, he should plead it; for he cannot give it in evidence under the general replication of *de injuria sua propria*.

Randle v. Webb. Espin. N. P. Cas. 38.

And if the day is material, and the defendant pleads *son-assault*, the plaintiff should new assign; for otherwise, proof of *son-assault*, any day previous to bringing the action, is a complete answer to it.

Note, in this action as in all others founded on torts, if the battery has been done by several, the plaintiff may bring his action either jointly or severally.

8. OF THE PLEADINGS ON THE PART OF THE DEFENDANT.

Bull. N. P. 17.

1. To this action there are three species of defence: The first is the *general issue*, not guilty; the second, *matter of excuse*, as, that it was done by accident, and without the defendant's default, &c. which may also be given in evidence on the general issue: the third is *a justification*, which insists upon such matter which made it lawful for the defendant to

to make the assault. But a *justification must always be pleaded, and cannot be given in evidence in general issue*, as upon the general issue he cannot give *son-assault demesne* in evidence; for it is a justification, and so of other causes of justification which we have treated of before. Co. Litt. 282. b.

But where in an action for an assault and false imprisonment against the captain of a ship, who pleaded *not guilty*: the defendant cross-examined the plaintiff's witnesses as to expressions used by the plaintiff which would have justified the imprisonment, they tending to create mutiny and disobedience. Though this evidence was objected to by the plaintiff's counsel, yet the judge admitted it, holding as good evidence in mitigation of damages *what was said at the time*; for every thing which passed at the time was part of the transaction on which the plaintiff's action was founded, and he therefore could not be surprised by the evidence. Bingham v. Garnault. Sitting London 1783. Coram Buller J.

2. "If an *indictment* has been preferred for the same assault and the defendant confessed it, and a *cognovit indictamentum been entered on the record*, it estops the defendant "to plead not guilty to an action for the same offence." 2 Hawk. 332.

*3. If the defendant *justifies* the assault and battery, he must *confess it*, or, on demurrer, the plaintiff shall have judgment. Gibbon v. Pepper. Salk. 677. *[3 Lev. 1.

4. "The plea should go to the whole offence as charged "in the declaration, or the plaintiff shall have judgment. But "if the plea is a justification, it shall go only to that part of "the offence of which it takes notice: *son-assault* goes to the "whole."

For where in trespass for assault, battery, and *wounding*, the defendant pleaded, that he was Constable of *D.* and for a misdemeanor of the plaintiff's that he had laid hands on him, and carried him to the stocks, *quo est eadem transgressio*. On demurrer the plaintiff had judgment; for the plea is a justification, and goes only to the assault and battery, but takes no notice of the *wounding*, which is charged in the declaration. Pindlebury v. Elmott. Cro. Eliz. 268.

"Neither is the general traverse, as to the rest, sufficient."

For where, in assault, battery, and *false imprisonment*, the defendant *justified the imprisonment* under process of an inferior court, but said nothing more than a general traverse to the assault and battery, the plaintiff had judgment; for it was not sufficient to justify the imprisonment alone, though it includes a battery; but the defendant should have pleaded to the assault and battery, by shewing resistance made to the arrest. Truscott v. Carpenter. 1 Ld. Raym. 229.

4. In action against a *servant*, if he pleads a justification in defence of his master, he must plead it thus: "That the Barfoot v. Reynolds. 2 Str. 953.

the plaintiff would have struck his master if he had not interposed, and struck the plaintiff, *prout ei bene licuit.*" For the servant can only strike to *prevent an injury*, not by way of revenge; and therefore where the servant pleaded, "That the plaintiff having struck his master in his presence, that he in his master's defence struck the plaintiff," the plea was held to be ill on demurrer, for the assault on the master might be over when the servant struck the plaintiff.

Leward & ux. v. Basley. 1 Ld. Raym. 67.

So in an action against the husband and wife, the wife may plead that plaintiff was going to wound the husband, and that she, *injultum fecit*, to defend him, and prevent the plaintiff from beating him.

"But in this or any other plea, the wife cannot plead alone, "the husband must always join."

Watson v. Thorpe ux. Cro. Jac. 239. [319]

In assault and battery against the husband and wife, he pleaded that his wife was assaulted, and that he in aid of and defence of her, assaulted the plaintiff, &c. She pleaded *son-assault demesne*. There was a general replication to both pleas of *de injuria sua propria*, and damages entire; and afterward a repleader was awarded, for reason that the *feme* had pleaded alone, which she could not do.

6. "A former recovery of damages in an action for the "same offence is a good plea in bar."

"And if the plaintiff has once recovered damages for the "assault and battery, he cannot afterwards recover in a new "action, for any *further mischief or injury arising from the "same battery.*"

Fetter v. Beale. Salk. 11.

As where, after the plaintiff in this action had recovered damages for the battery, a piece was cut out of his skull in consequence of the former wounding, for which he brought a new action, it was held not to lie; for the battery itself is the ground of the action, and the injury the measure of the damages; but here the ground of the action was gone by the first recovery.

Yelv. 68.

So if a battery has been committed by several, and a recovery had against one, such recovery may be pleaded in bar to an action brought against any of the others for the same battery; for plaintiff can receive but one recompense for the same injury.

Gray v. Hart. 2 Salk. 517.

7. If the defendant justifies an assault and battery under a writ to the sheriff, and warrant directed to him to arrest the plaintiff, he should set out from what court the writ issued, or it will be bad. Here he justified under a writ returnable in *C. B.*, and it was held ill; for it might be a writ out of the *K. B.* or *county palatine*, which cannot be returnable in the *Common Pleas*.

8. By

8. By statute 21. *Jac.* 1. *c.* 16., "all actions of assault and "battery must be sued within *four years*; and this statute "must be pleaded in bar."

Therefore where to this action defendant pleaded by mistake *non culp. infra sex annos*, it was on demurrer held to be a bad plea. Blackmore v. Tidderly. Salk. 442.

9. The defendant cannot plead double under the statute, the general issue *not guilty*, and a justification; for they are contradictory, since a justification must admit what the general issue denies. 2 Ld. Raym. 1099. S. C. Palmer v. Wadbroke. 2 Stra. 876.

10. This being a transitory action, in which the time or place are merely inducement, the place cannot be traversed without special cause of justification, which extends to some certain place: as if a constable of a town of another county arrests the body of a man that breaketh the peace there, he may traverse the county, but he must not rest there, but all other places saving in the town whereof he is constable. Co. Lit. 282. [320]

Note, By stat. 7 *Jac.* 1. *c.* 5. If trespass in assault or battery is brought against any justice of peace, constable, &c. for any thing in execution of their office, *they may plead the general issue*, and give the special matter in evidence.

By stat. 23 *G.* 3. *c.* 70. it is enacted, "That no writ shall "be sued out against, or process served on an excise officer "for any thing done in the execution of, or by reason of his "office until after a month's notice in writing." Daniel v. Wilson. 5 T. Rep. 1.

In this case the defendant, who was an excise officer, having been in pursuit of some smugglers, had, after a violent struggle, in which he had been severely beaten, taken some run goods, but the smugglers themselves had retired. In about five minutes after, the plaintiff, who had in truth nothing to do with the smugglers, passing by the defendant with something on his back, the defendant suspecting him to be a smuggler ordered him to deliver what he was carrying. He answered he had nothing to deliver, being only a fisherman, upon which the defendant assaulted him, for which assault this action was brought, and no notice having been given under the statute the plaintiff was nonsuited: on a motion to set aside the nonsuit it was contended, that notice was not required, the defendant not being then acting in the execution of his office: but the Court held, that the act was intended to protect such officers as, acting in *bona fide* discharge of their duty, were inadvertently guilty of some excesses beyond the line of their duty; that that was the case here, the defendant having acted in the supposed execution of his duty, and that he therefore was entitled to notice.

4. OF

4. OF THE EVIDENCE.

1. OF THE EVIDENCE ON THE PART OF THE PLAINTIFF.

Per Pratt, J. 1 Stra. 68. 1 Sid. 325. Rex v. Warden of the Fleet. Per Holt, arg. Car. K. B. 389.

1. As the plaintiff in this action may also prosecute the defendant by indictment for a breach of the peace, it is to be known that the plaintiff cannot give in evidence in the action *a conviction on an indictment for the same assault*; for it is a rule of evidence, that no verdict shall be given in evidence except where the parties have been the same, and in one case the King is one of the parties, and in the other the plaintiff: nor is any thing to be admitted in evidence of which both parties have not equal benefit; that is, such as either party should be equally at liberty to give in evidence, in case it made for him.

2. "The plaintiff was in a cause of assault allowed to give "in evidence what was felony."

Westbrook v. Strutville. 1 Stra. 79.

As where in assault and battery, the defendant gave in evidence, *that he was married to the plaintiff*; and to take away that evidence, the plaintiff was admitted to prove that *she had another husband living when she married the plaintiff*.

Guy v. Kitchener. 2 Stra. 1271.

3. In this case the memorandum was generally of *Michaelmas* term, and *son-assault* being pleaded, the fact was proved at *a day within the term*: a case being made, the Court held it well enough, for the plaintiff need have given no evidence on this plea, unless to aggravate damages; and the Court will not nonsuit him, because it is amendable by a new bill.

2. OF THE EVIDENCE ON THE PART OF THE DEFENDANT.

Bownes v. Skrymsher. Brownl. 233. Vide Randle v. Webb. ante, 317.

There is a difference to be observed between what may be given in evidence on the issue of *son-assault demesne* and on *not guilty. If the defendant pleads *son-assault demesne*, and the plaintiff replies *de injuria sua propria*, &c., the plaintiff shall not be allowed to give in evidence a battery at another day and place than that laid in the declaration. But upon not guilty pleaded, the plaintiff may give in evidence an assault and battery at any time or place.

*[321]

Dickinson v. Davis. 1 Stra. 480.

2. In an action by husband and wife, for a battery of the wife, on the general issue pleaded, the defendant shall not be allowed to prove or to go into evidence that the woman is not wife to the plaintiff: it should be pleaded in abatement, that so the plaintiff might meet the objection fairly.

4. OF THE VERDICT, DAMAGES, AND COSTS.

It is previously to be observed, that in cases of very gross assault, in which it is apparent that the damages will exceed 10*l.*, the Court, or any judge of the court, may give leave to the plaintiff to sue out a writ with a clause of *ac etiam billæ*, and hold the defendant to special bail. 1 Sid. 307. Raym. 74.

1. OF THE VERDICT AND DAMAGES.

1. In assault and battery, if the jury find upon the plea of not guilty, the defendant guilty in another town, or at another day than the plaintiff has laid, yet shall the plaintiff recover, for it is transitory. Litt. s. 485.

2. "As to the damages, it is a general rule, that the plaintiff shall have but one recompence in damages, though the assault and battery be committed by several, and though his action be brought either joint or several."

As where in assault and battery against two, one pleaded *not guilty*, and the other *son assault demesne*, and both issues were found to the plaintiff; it was held, That there should be but single damages assessed. So where one defendant had pleaded specially, and the plaintiff demurred, and had judgment on demurrer, it was adjudged that there should be but single damages assessed. Crane and Hill v. Hummerstone. Cro. Jac. 118. Sir J. Heydon's case. 11. Co. 6, 7.

Therefore where the plaintiff declares jointly, the jury cannot sever the damages so as to give greater against one than another. But if the jury find otherwise, the plaintiff may enter a *noli prosequi* against all but one, and have judgment against him. Rodney v. Strode. Carth. 19. Vide Mitchell v. Milbank & al. 6 T. Rep. 199.

"But in this, as well as other actions of trespass against several, the jury may find some guilty, and others not guilty." [322]

But in this case, where the action is joint, and no part of the evidence applies to one, the plaintiff must elect to proceed against the rest, and that one have a verdict. But in such case, if there was good cause to make him a defendant, the judge will certify. Cosgrove v. Hill. Sitting Trin. 30 G. 3. cor. Buller J. MSS.

And so in the case of a battery against husband and wife, the jury may find the wife guilty, and the husband not guilty; and *vice versa*. Dare v. White & ux. Show. 350.

3. Where there has been a *mayhem*, or wounding, the Court may *upon view increase the damages*, even though a *mayhem* was not laid in the declaration; but under the following restrictions, *viz.* 1. The judge who tried the cause at *Nisi Prius* may not himself increase the damages; he ought to certify it by indorsing on the *postea* what maim or wound Cook v. Beak 1 Ld. Raym. 176. S. C.

was

Latch 223. was proved: unless he is a judge of the same court wherein the motion is made for increase of damages.

S. C. 2. The plaintiff must always be present in court when the motion is made for increase of damages.

Style 245. S. C. 3. The manner of wounding should have been stated in the declaration.

4. "Upon a motion to increase the damages *super visum* "*vulneris*, it should be proved to be the *same wound* for "which the damages were given."

Smallpiece v. Beckenham. Mich. 27. Car. 2. C. B. Bull. N. P. 21. For where the maim in this case was the loss of an eye, the Court ordered the defendant and the witnesses to appear and be examined, and several of the jury who tried the cause, and it appearing that no evidence had been given at the trial of the loss of an eye, the court would not increase the damages for that, for new evidence should not be admitted.

Brown v. Seymour, 1 Wils. 5. 5. But where the judge who tries the case certifies or declares that he is satisfied with the verdict, the Court will not increase the damages.

Burton v. Barnes. 1 Barnes 106. 6. In this case on a view of the party and examination of the surgeon, *ore tenus*, in court, the damages were increased from 11*l.* 14*s.* to 50*l.*

2. OF COSTS.

[323] 1. By stat. 22, & 23 *Car.* 2. *c.* 9. "In actions of assault "and battery, if the damages recovered are under forty "shillings, the plaintiff shall have no more costs than dam- "ages, unless the judge shall certify *that the assault and bat- "tery were sufficiently proved*; and if any more costs are "given the judgment shall be void, and the defendant be ac- "quitted, and have his action against the plaintiff for such "vexatious suit, and recover his costs and damages in any "court of record."

Bayley v. Taylor. Gloucester Lent. Ass. 1757. MSS. It seems not to be completely settled whether in a case of this nature it is discretionary in the judge to certify or not: in this case Mr. Justice *Foster* held, That it was perfectly discretionary to give or withhold the certificate.

But it was there said, that Justice *Wilmot* had held otherwise.

But, 1. "The action must be solely an action of assault "and battery to deprive the plaintiff of his costs; for if it "is coupled with any other offence which does not require "a certificate, and the defendant is found guilty, *that* shall "take it out of the statute, and give the plaintiff full "costs."

For

For where in trespass for an assault and battery, breaking a standard and roller, and taking and carrying away divers goods and chattels; the defendant was found guilty of all except the taking and carrying away, and damages found under forty shillings. On the question arising concerning the costs, the Court held, That though the assault and battery alone might require a certificate, yet that part concerning the breaking the standard and roller not requiring it, and both making one cause of action, that the plaintiff should have his full costs.

Millbourn v. Rean. Trin. 17, 18. G. 2. C. B. quot. 3 Wils. 322.

2. "But this matter to entitle the plaintiff to full costs, "where the damages are under forty shillings, must be "charged, and found as a substantive issue, and independen "of the assault; for where it is merely part or a consequence "of the assault and battery there shall not be full costs."

For where the action was for assaulting the plaintiff, and *tearing his coat*, which the jury found to be *a consequence of the battery* and damages under forty shillings, the plaintiff had no more costs than damages.

Cotterill v. Tolly. 1 T. Rep. 556.

And unless the tearing of the clothes be at a different time he shall have no more costs than damages.

Lockwood v. Stannard. 5 T. Rep. 482.

So where the declaration was that the defendant assaulted the plaintiff, pushed him down on the ground, the ground being covered with water, whereby his coat was wet and spoiled, and he became sick and weak: after verdict for the plaintiff, and damages twenty shillings, there being no certificate, the court held the plaintiff not entitled to full costs, *for the spoiling of his coat was not a distinct thing from the assault*, but an injury arising from the original cause of action, and a consequence of it.

Hampson v. Adshead. Sayer's Rep. 91. Buller. N. P. 329. S. C.

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So where the action was assault and battery, with a *nec non insultum fecit* on the plaintiff's horse, and damages under 40*s*., the special matter as to the horse was held not to entitle the plaintiff to full costs, it being part of the same offence.

Clerk v. Othery. 1 Stra. 624.

2. "Though another offence be joined as the consequence "of the assault and battery, if that is an offence in itself ac- "tionable, though the damages are less than 40*s*. yet the "plaintiff shall have his full costs."

As in trespass for an assault and battery of the plaintiff's wife or servant, *per quod consortium* or *servitium amisit*, and damages under 40*s*., yet shall the plaintiff have his full costs; for the special damage is the gist of the action, and of itself actionable.

1 Stra. 193.

3. If the defendant *justifies*, he admits the battery, and in such case no certificate is necessary to entitle the plaintiff to full costs, if the damages are under 40*s*.; for the judge could

Richards v. Turner. Trin. 6. Geo. 1. C. B. Buller. N. P. 330.

could only certify that the assault and battery was well proved, which the defendant admits. But if the defendant justifies, and the plaintiff makes a new assignment, to which the defendant pleads not guilty, if the damages are under 40*s.*, the plaintiff must have a certificate to entitle him to full costs.

"But the justification must be both of the assault and battery, in order to entitle the plaintiff to full costs."

Page v. *Creed*, 3 Term. Rep. 391.

For where in an action of trespass for an assault and battery, the defendant pleaded first not guilty to the whole; and, secondly, a justification *of the assault only*, and the damages one shilling; it was resolved, That the justification not going to the battery, and there not being any certificate, that the plaintiff should have no more costs than damages.

3 Wils. 326.

For the certificate under stat. 22 & 23 *Car.* 2. must be that the assault and battery was well proved, not the assault alone: and therefore a justification of the assault only is not sufficient.

4. And by statute 8 & 9 *W.* 3. *c.* 10. *s.* 4. "If the judge "shall certify that the trespass for which the action was "brought was wilful and malicious, though the damages "were under 40*s.*, yet shall the plaintiff have his full costs."

3 Wils. 326. *[325]

* And where there was an assault only, and no battery, but that appeared to be *wilful and malicious* (as drawing a sword and attempting to stab the plaintiff,) Lord Ch. Just. *Willes* said, That he would certify under this statute, in order to give the plaintiff his full costs, as the damages were under 40*s.*

AS TO COSTS TO THE DEFENDANT.

By stat. 8 & 9 *W.* 3. *c.* 11. "Where there are several "defendants in an action of assault and battery, and one or "more shall be acquitted, the person so acquitted shall be "entitled to his full costs, unless the judge certifies that "there was reasonable ground for making him a defendant." *Ante* 322, *Cosgrove* v. *Hill*.

2. "By stat. 7 *Jac.* 1. *c.* 5. "In actions of assault, battery, and false imprisonment, brought against *justices of "peace, mayors, bailiffs, or constables*, for any thing done by "virtue of their offices, if they have a verdict, or the plaintiff discontinue, or be nonsuit, they shall have double costs."

For constructions on this statute, *vid. post*, Ch. *Trespass*.

And by statute 21 *Jac.* 1. *c.* 12. the provisions of the last act are extended to *church wardens and overseers of the poor*.

CHAPTER

CHAPTER V.

The Action of False Imprisonment.

THE offence of *False Imprisonment* consists in the unlawful detention of the person without any legal authority: it is therefore necessary to constitute this offence, to determine what detention is unlawful.

Every detention of the person, as by confinement, either in a prison or private house, in the stocks, or by forcibly detaining one in the street, is an imprisonment. 2 Inst. 589.

I shall therefore consider, 1. What arrests or detentions are illegal, and as such will support this action: 2. What are legal, and so afford a good justification to the person sued in this action for the arrest or detention: 3. The pleadings and evidence on the part of the plaintiff and defendant: and, 4. The verdict and damages.

But it is previously to be observed, that no action of false imprisonment lies against a *judge of a court of record*, for any act done by him in execution of his office, nor for any mistake of judgment: neither are his acts or decisions traversable. This was decided in this action brought against the officers and censors of the College of Physicians, who, having a power to examine and punish by fine and imprisonment, were held to be a court of record. Groenvelt v. Burwell. Salk. 396.

1. WHAT ARRESTS OR DETENTIONS ARE ILLEGAL.

Arrests are illegal, 1. Considered with reference to the Person arrested: 2. To the Writ or Process: To the Court from whence it issues: 4. In cases reducible to no certain head.

1. OF ILLEGAL ARRESTS WITH REFERENCE TO THE PERSON.

1. An *executor or administrator* can only be arrested for a debt of testator's or intestate's *on a suggestion of a devastavit*; *therefore where no such suggestion was made, and the plaintiff who had administered to her husband, was arrested for a debt due by him in his lifetime, this action was adjudged to lie against the *plaintiff* in that action, and the *attorney* in it who had sued out the writ. It was contested in this case, that the action should not lie against the attorney; but the Court Barker executor v. Braham and Norwood. 3 Wils. 368. *[327]

Court held him liable, the offence being a trespass in which all are principals.

"But a distinction is to be observed between arrests of "persons *not liable to arrests*, and arrests of persons who are "liable in general, but *have a particular privilege or exemption*; "for the arrest of these last is not illegal, nor subjects the "party to this action."

Cameron v. Lightfoot. 2 Bl. Rep. 1190.

As where the plaintiff was a *witness* in a cause at *Westminster*, and was arrested by the defendant in returning from thence, false imprisonment was held not to lie against the party who arrested him; for the exemption from arrests is a *privilege* not of the person but *of the court*, and the writ is not void, for the suit continues, though the party may be discharged on motion.

Tarlton v. Fisher. Dougl. 646. Countess of Rutland's case. 6 Co. 52. b.

So in the case of other privileged persons, as *peers, certificated bankrupts, insolvent debtors*, or such like, no action of false imprisonment lies for arresting them; but in such cases the action was held clearly not to lie, as against the officer who made the arrest, for he was at all events justified by the writ, which was compulsory.

Wilson v. Tucker. Salk. 78.

But in case of an arrest on a *Sunday*, the process being declared by the statute to be *void*, this action will lie.

2. "In actions against *husband and wife*, the arrest is only "legal, if made in pursuance of these cases."

Bardolph v. Perry & ux. Moor. 701. Wilmot v. Butler. Sayer Rep. 149.

1. If the action is against the husband and wife *for a debt of the wife dum sola*, and judgment for the plaintiff, the *capias* shall issue to take the bodies of *both* husband and wife in execution, for it must follow the judgment.

Langstaff v. Rain. 1 Wils. 149.

So in an action against the husband and wife for an assault by the wife, it was held that both might be taken in execution.

Harrison v. Bearcliffe. 2 Stra. 1272.

But this is the case only in arrest on *final process*; for in the case of *mesne process*, where both were arrested for a debt of the wife's *dum sola*, she was discharged, and he retained till he found bail for both.

Edwards v. Rourke & ux. 1 Term. Rep. 486. *[328]

So where *non est inventus* was returned as to the husband to a writ against both, and the wife only arrested, she was *discharged out of custody, though the suit was for a debt of the wife's, *dum sola*.

Roberts v. Andrews. 2 Black. Rep. 720. and case Ibid.

So where an interlocutory judgment was signed against both, and a *sci. fa.* issued against the bail, who surrendered them into custody *before execution*, the wife was discharged.

Doyley v. White. Cro. Jac. 328.

2. But if the action had been originally commenced against the wife *when sole*, and pending the suit she married, and

and the plaintiff has judgment, the *capias* shall issue against *the wife only*, and not against the husband. Anon. Cro. Car. 513.

2. But on all judgments obtained on the wife's contracts, or for her torts committed *during coverture*, the writ shall go against the *husband alone*.

3. "Where a writ issues against any one, and the officer "mistakes the defendant, and executes the writ by *arresting* "*a wrong person*, the person so arrested may maintain this "action, even though he was himself accessary to such false "arrest."

As where in false imprisonment the defendant justified, that he, having a warrant against *J. S.*, asked of the plaintiff his name; who answering *J. S.*, *which was not his true name*, the defendant arrested him; on demurrer this plea was held to be bad, for the officer must take the right person at his peril. Coot v. Lightworth. Moor, 457.

So where a commission of rebellion issued against one *Thurbane*, and a person of the name of *Green* appeared before the commissioners, and affirmed himself to be *Thurbane*, and being apprehended, he resisted and snatched the commission and tore it in pieces. For this on an attachment it was ruled by Chief Baron *Hale*, that though he *had falsely affirmed himself to be* Thurbane, yet that would not excuse the commissioners from false imprisonment, for they had no warrant to arrest *him*. Thurbane's case. Hard. 32.

But in such case, though mistake will not excuse, yet it will go very far in mitigation of damages.

2. Of illegal arrests with reference to the writ or other process.

This is, 1st, Where the arrest is made without Process, on a charge only: 2dly, Where the Process is void: 3dly, Where it is irregular.

1. Of Arrests on a Charge only.

If a person suspect another to have robbed him, or to have committed any other felony, and charge a constable with him, who takes him into custody, and brings him before a magistrate, before whom an investigation taking place, the charge turns out to be unfounded, the person who gave such charge is liable to an action for false imprisonment. The doubt in this case was, Whether in such case, the remedy was not *case* for maliciously charging the party? *Post.* 334. *Samuel* v. *Payne*. Stonehouse v. Elliot. 6 Term Rep. 315. Espin. N. P. Cas. 271: S. C.

But the merely giving a person in charge to a peace-officer where the officer never takes the person into custody, is not an imprisonment which will support an action. Simpson v. Hill. Espin. N. P. Cas. 431.

2. In

2. In the Case of Void Process.

Parsons v. Lloyd. 3 Wils. 341. 2 Black. Rep. 845. S. C.

The plaintiff in this action was arrested by the now defendant, by a writ of *capias ad respondendum*, *returnable the term next but one to the teste* (it was of *Trinity term* and returnable in the *Hilary* following;) this writ being irregular and void, (as every writ of *mesne process* should be returnable *the next term to the teste*, for otherwise the defendant might be imprisoned for a long time,) false imprisonment was adjudged to lie against the now defendant, who was plaintiff in the former action; though it was agreed that this writ had been a good justification to the *officer*.

3. In the Case of Irregular Process.

Phillips v. Biron. 1 Stra. 509.

As where the defendant in a former action (the plaintiff in this) had been arrested by a *ca. fa.* founded on a judgment, which was afterwards set aside for irregularity; it was adjudged that he might well maintain this action for the arrest. And a distinction was taken between process irregular and erroneous; *viz.* "That if erroneous, it is the act of the court "and the party shall not suffer; but if it is irregular, it pro-"ceeds from the act of the party or his attorney, and an ac-"tion will lie on it."

And the *process of arrest* has been held *irregular* and void in the following cases:

1st. "*Where filled up without proper authority.*"

Burflem v. Fern. 2 Wils. 47.

1. As where *Burflem* the plaintiff being indebted to one *Jones*, *Jones*'s attorney sued out a writ against him, but the under-sheriff left a blank in the writ for the name of a bailiff, and *Jones's attorney inserted the name of* Fern (*the defendant*,) who arrested the plaintiff. False imprisonment was adjudged to lie against *Fern*, for the arrest was illegal, as *the under-sheriff* should have inserted the name in the writ of some sheriff's officer; for by leaving it to the attorney, he might nominate persons of no property, or infamous characters, who might be guilty of oppression, and have nothing to answer to the party injured: the arrest should be by the officers of the sheriff, who have given security to him.

2dly, "*Where it has issued informally.*"

Smith v. Bouchier. 2 Stra. 993.

The defendant in this case justified an arrest of the plaintiff, by process out of the Vice-Chancellor's court of *Oxford*, and shewed that by the custom a plaintiff making oath of his cause of action, and that *he believes* that the defendant will abscond, may have a warrant to arrest him and hold him till security given, and then shews, that he made such oath of his cause of action, and that *he suspected* that the defendant would run away; upon which he had a warrant from the Vice-Chancellor, and arrested the now plaintiff. Upon de-

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murrer

murder, the Court held the custom not to be pursued, for the custom is to swear to the *belief* of the defendant's intention to abscond, and here the plaintiff only swore to his *suspicion*, which is not the same: for that may be a ground of suspicion, which will not induce a belief, and the arrest being therefore made under the custom, was illegal, and that so the party might have this action of false imprisonment.

3. When the process was *not returnable on a day certain*, under which the defendant had been arrested, the writ was adjudged to be void, and this action to lie for the arrest. Johns v. Smith. Cro. Jac. 514, 2 Wils. 256.

4. Where the defendant was arrested, and *the affidavit to hold him to bail was irregular*, saying *in indebted* for *is indebted*, so that he was entitled to be discharged; Justices *Clive and Gould* were of opinion, That this action lay against the plaintiff or filazer, for such arrest.

5. Where a judgment is of one county, the defendant cannot be arrested in another, without a *testatum capias*, or suggestion that the defendant was commorant in such other county. In such case, therefore, where the defendant was so arrested, without any *testatum* or suggestion, this action was held to lie. Allen v. Allen, 2 Black. Rep. 694.

3. OF ILLEGAL ARREST, WITH REFERENCE TO THE COURT OR MAGISTRATE WHO HAS ISSUED THE PROCESS.

This is, 1. By issuing Process *where it has no Jurisdiction*: 2. *Where it exceeds or does not pursue its jurisdiction*: 3. *Where the subsequent Proceedings are irregular.*

1. Where there was no Jurisdiction.

1. If a person is arrested by process out of an *inferior court not having jurisdiction*, he may have this action against the plaintiff in that action; and his having pleaded to that action in the inferior court shall not be such an admission of the jurisdiction as shall bar him of his action for the false imprisonment; for every one should know the extent of that court's jurisdiction to which he applies for redress. Higginson v. Martyn & Hadley, Mich. 28 Car. 2. Buller, N. P. 83.

2. Where the Inferior Court exceeds or does not pursue its Jurisdiction. [331]

1. "And wherever an authority to commit is given by "statute, it must be strictly pursued:" as in the case of *Smith* and *Bouchier*. *Ante*, 329.

1. So where, by statute 14 *H.* 8. All persons are forbid to practise physic in London, or within seven miles of it, unless allowed by the president and censors of the College of Physicians; and four *censors* are appointed yearly, who may *punish by fine and imprisonment* persons offending in practice, *non bene utendo et exequendo facultate medicinæ*. The plaintiff practised in *London* without being so allowed, and being summoned, he said, *he would practise without their permission*; for which by warrant Doctor Bonham's case. 11 Co. 114.

warrant from *the president and censors*, he was committed to the Counter; and on bringing this action for false imprisonment, it was held well to lie: 1. Because the act appoints *the censors* to fine and imprison, here it has been done by *the president and censors*; 2. The offence for which the party is to be committed is *pro non bene exequendo facultate medicinæ*: here the *committal* is for saying that *he would practise without their permission*: so that the power of committing not being strictly pursued, the persons committing were held to be trespassers, and that the action lay.

2. "So in the case of *commissioners of bankrupt*."

Dyer v. Missing. 2 Black. Rep. 1075.

This action was adjudged to lie against the defendants, who were commissioners of bankrupt, for committing the plaintiff, (whom they suspected of secreting part of the bankrupt's effects,) for not appearing on *the first summons*, The statute of 1 *Jac.* 1. *c.* 15, enacting "that in such case "a summons shall first go to the party to appear, *and on* "*his default, or neglect, a warrant or second summons*; and "if brought in on the warrant, he refuses to be examined, or "on a second summons neglects to come, *then, and not be-*"*fore*, the commissioners have power to commit;" and here having been committed on *the first summons*, the imprisonment was contrary to law.

Miller v. Sears & al. 2 Black. Rep. 1141.

And this action lies against commissioners of bankrupt for any commitment not warranted by their power; as for not answering a question, which question appears to be improper; or where they do not acquiesce in a sufficient answer, but commit the party; so if the *time* committed for is improper.

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3. Where the Court or Magistrate has Power, but the Proceedings are irregular.

Crawley's case. Cro. Jac. 567.

1. The defendant was committed by the sessions for not taking on himself the office of constable of a place of which he denied that he was an inhabitant. This commitment was adjudged unlawful, for he should *first have been indicted* for refusing to undertake the office; and if he had been found on the indictment to be an inhabitant of the place, he should have been fined, and committed only for non-payment of the fine.

Hill v. Bateman. 2 Stra. 710.

So where the defendant was a justice of peace, and convicted the plaintiff for destroying the game, and though it was proved *that the plaintiff had effects sufficient to answer the conviction* if distrained, yet the defendant *sent him immediately to* Bridewell, without endeavoring to levy the penalty upon his goods. This action was held well to lie against the justice for such irregular commitment: for the statute punishes by penalty, and orders the party to be imprisoned only

only *in case of non-payment*; therefore the justice should first have issued his warrant to levy the penalty.

So where the plaintiff was convicted in a penalty for harbouring run goods contrary to statute of *Geo.* 1. in a penalty of 13*l.* which he offered to pay, but was kept in custody *till he paid a further sum of* 5s. 4d. *for fees*, which could not by law be demanded: this action was adjudged to lie for such detention, when he was entitled to a discharge. Smith v. Sibson, 1 Wils. 153.

For, by law, an officer arresting a person on a warrant, cannot detain him for his fees. Mason v. Cutterson, 1 Lord Raym. 4.

But where a person was arrested, and soon after a discharge was given him by the plaintiff, but the officers detained him 24 hours after the discharge was sent: on an action being brought against the sheriffs for false imprisonment, the defence was, That they detained the plaintiff in this action only till they searched the office to see if there were any more writs against him. Lord *Kenyon* held, That where a person is arrested, that the officer is not bound to search if there are any other writs against the person arrested till a written discharge comes from the plaintiff at whose suit the person is arrested; the officer is there allowed a reasonable time to make this search, and as 24 hours seemed a reasonable time for this purpose his Lordship directed a nonsuit. Taylor v. Brander & al. Espin. N. P. Cas. 45.

2. "So though the original arrest might be warrantable, "yet *for any subsequent oppression or cruelty*, this action lies."

As where the defendant was governor of *Senegambia*, and the plaintiff being an officer, from the dangerous state of his health, had quitted his post without leave, for which he was justly put into confinement; but it appearing that *circumstances of unnecessary and wanton cruelty had been practised*, as confining him for a long time in a dungeon, without the benefit of fresh air, when dangerously ill, he recovered considerable damages in this action. Wall v. M'Namara. 1 T. Rep. 536.

For other cases of arrest, *vid.* Action of Trespass on the Case, Chap. XIII.

4. OF CASES REDUCIBLE TO NO CERTAIN HEAD.

As, 1. The mayor and burgesses of *St. Alban's* made a rate for building a court-house, to be assessed on the inhabitants at large, and made a *bye-law thereon*, "That any one refusing to pay such rate should be imprisoned." Under this bye-law the plaintiff was taken and imprisoned, and this action was adjudged to lie for such imprisonment; for no bye-law can create such a power; it is contrary to *Magna Charta*, which declares, "That *nullus liber homo capietur aut imprisonetur nisi per judicium parium suorum.*" Clarke's case. 5 Co. 64. [333]

2. So where a person was arrested, and the person at whose suit he had been arrested *ordered the sheriff to discharge him*, Withers v. Henley. Cro. Jac. 397.

him, and released him of the action, notwithstanding which the sheriff detained him, this action was adjudged to lie against the sheriff. So where there was a *supersedeas* sent to the sheriff, and the party was not discharged, this action was held to lie.

3. Where any false imprisonment has been done by *the "influence or procurement of another*, this action shall lie."

Rafael v. Verelst. 2 Black. Rep. 1055.

As where the defendant, who was an *East India* governor, *prevailed on the Nabob to imprison the plaintiff*: this action was adjudged to lie against him, though the actual imprisonment was by another.

Mostyn v. Fabrigas. Cowp. 161.

4. So this action lies for any injury *committed in a foreign country*; as in this case, against the governor of *Minorca* by an inhabitant whom he had falsely imprisoned.

5. By stat. 5 *H.* 4, *c.* 20. justices of peace shall imprison no person but in the common gaol, saving the rights of lords who have gaols in their franchises. *Quære*, If false imprisonment would not lie on this statute if a justice of peace imprisons a person elsewhere.

2. WHAT ARRESTS OR DETENTIONS ARE LEGAL.

3 Bl. Com. 127.

1. "The first is the case of arrests under the process of "some court of justice having cognizance of the cause, "which process has regularly issued."

Britton v. Cole. Salk. 408. Countess of Rutland's case. 6 Co. 52.

But a distinction is to be observed in the case of officers and private persons. If the action is against the *sheriff* for the arrest, he shall *justify* sufficiently *by shewing the writ*. So it is in the case of his bailiff or officer, with this difference, that the sheriff *must shew the writ returned*, if returnable; which the plaintiff need not, as it is not in his power. But if the action is against the plaintiff in the first action, or a mere stranger, they cannot justify unless they shew a *judgment* as well as execution; for the judgment might have been reversed.

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3 Bl. Com. 127.

2. "A second good justification under a legal arrest is, "if made by an officer having authority to arrest, or under "such officer's or magistrate's warrant under hand and seal, "and expressing the cause of the commitment."

Samuel v. Payne. Dougl. 345.

1. A *peace officer* can justify an arrest on a *charge of felony*, though he has no warrant against the person charged, and though it should afterwards appear that no felony had been committed; but in such case a *private person* could not justify, for a peace officer is bound to take into custody a person charged with a felony, and bring him before a magistrate; and it would be mischievous if the officer was first to try and exercise his judgment at his peril.

Vid. ante, Stonehouse v. Elliot.

But if a *felony has been actually committed*, a constable or even a private person may justify an arrest, if it is made without

without malice, and in pursuit of the offender upon fair and reasonable grounds of suspicion.

But where a watchman took up a person for speaking loud and making a noise in the street, and brought him to a constable, who sent him to *Tothill-fields* Bridewell, it was held by *Eyre*, Ch. Just. that this was not sufficient to justify either the arrest or subsequent committal, and an action for false imprisonment was held to lie. Hardy v. Murphy & al. Espin. N. P. Cas. 294.

2. But where the arrest is by warrant, it must appear "that the warrant was legal; that is, issued in a case of "which the magistrate had cognizance; for if not, the "warrant shall not justify the officer acting under it." 2 Inst. 46.

As where a justice of peace issued his warrant to the defendant to *arrest the plaintiff*, on a complaint *for non-payment of servants' wages*, and the defendant did arrest the plaintiff; this action was adjudged to lie against him, for a justice of peace has no such power to grant such a warrant to apprehend the party complained of; he can only issue a *summons*: it was therefore an illegal warrant, and no justification to the defendant. Shergold v. Holloway. 2 Stra. 1002.

So an officer cannot justify an arrest and imprisonment for non-payment of taxes *under the general printed warrant* which such collectors have signed by two justices: but he ought to have a special warrant. Masters v. Butcher. 1 Lord Raym. 740.

3. So a magistrate may commit for any contempt shewn him, but it must be while in execution of his office. Therefore where in this action the defendant justified that he being mayor of the corporation of *W.* the plaintiff said, "He was a fool," wherefore he committed him. It was held ill, for not shewing that he was in his seat, or exercising his office. Anon. Moor 740.

3. A third good cause of arrest is such as is warranted by the necessity of the thing: as arresting a felon by a private person; impressing sailors in the time of war; apprehending waggoners for offences or misbehaviour on the highway, and such like causes. 3 Bl. Com. 127. Foster's Crown Law. [335]

4. *Secretaries of State* may commit for suspicion of treason, as conservators of the peace did at common law; and it is incident to their office: and a commitment to a messenger is good. Rex v. Kendal & Roe. 1 Salk. 347.

But they have no power to issue a *general warrant* to arrest the person, or seize the papers on a general information. Entic v. Carrington. 2 Wils. 275.

5. "*Commanding officers in the service of the army or navy* "have a power of putting their inferior officers under an "arrest; but it must be done on good grounds, and not "oppressively."

As

Swinton v. Molloy Term Rep. 537.

As where the defendant was captain of the *Trident* man of war, and put the plaintiff, who was the purser, into confinement; he kept him there for three days, after which he liberated him, without any charge or court-martial. The plaintiff recovered for the imprisonment.

Le Caux v. Eden. Dougl. 592.

6. False imprisonment will not lie for the taking and detaining the mariners of a ship, which has been captured *as a prize*, though the Court of Admiralty afterwards find her not to be a lawful prize. For the Court of Admiralty possesses an exclusive jurisdiction not of prize only, but of every matter dependent on it, which this is, as the mariners must be brought in with the vessel; and that Court can give damages for the injury and detention to the individuals who are injured.

4. OF THE PLEADINGS AND EVIDENCE.

1. OF THE PLEADINGS AND EVIDENCE ON THE PART OF THE PLAINTIFF.

I find no cases of consequence to this head, except the following, *viz.* 1. "That under the *alia enormia* no facts "can be given in evidence which might, consistent with "decency, be stated on the record."

Lowden v. Goodrick. Peake 46.

Therefore on a declaration for false imprisonment the plaintiff cannot give in evidence, that he was stinted in his allowance of food, unless it is specially stated in the declaration.

Petit v. Addington. Ibid. 62.

So he cannot give in evidence, that being confined in a common prison he caught the gaol fever, unless specially laid as a consequence of the imprisonment.

2. "That no new matter foreign to the issue is admissible "in evidence, under the general replication of *de injuria sua* "*propria*, of any fact which is not contained in the plea; "for those alone are traversed by the replication."

Sayre v. Lord Rochford. 2 Black. Rep. 1155.

For where to an action of false imprisonment the defendant pleaded a justification of the arresting the plaintiff under an information for treasonable practices, made to him as secretary of state, for which offence he had been admitted to bail by the chief justice of the *King's Bench*. The plaintiff replied the general replication of *de injuria sua propria absq. tali causa*. It was adjudged, that under this replication [336] that the plaintiff could not give in evidence *a tender and refusal of bail*, for it was not contained in the issue.

Hillyfield v. Stanyford. Mic. 25 Car. 2. Bull. N. P. 23.

3. The defendant in this case justified, that he had arrested the plaintiff by a *latitat* for 20*l.* which he owed him; the plaintiff replied, and traversed that he owed so much money, and a repleader was awarded; for the debt is but inducement, which should not be traversed.

4. "Where

3. "Where the writ or process is but inducement to the "action, in which case *its tenor* need not be set out; but "the *substance* merely; a variance in point of form, though "not in substance, shall not be held fatal.

As where, in an action of false imprisonment, the bill of *Middlesex*, on which the party had been arrested, was set out in the declaration as follows: "The sheriff is commanded to take *A. B.* (the then defendant) and *John Doe*, if, &c. and them, &c. so that he have their bodies before our Lord the King at *Westminster*, on, &c. (*verbatim* to the end:) the bill of *Middlesex* being read, was in these words: "The sheriff is commanded to take *A. B.* and *John Doe*, *if they shall be found in his bailiwick, and them safely to keep*, so that he have their bodies," &c. It was insisted that this was a variance between the bill of *Middlesex* and the record; but Ch. Just. *Lee* held, That the bill of *Middlesex* need not have been set out, that the substance was sufficient, and therefore the evidence was sufficient, as there was no variance between the bill of *Middlesex* and so much as was set out in the record. Wilson v. Mawson. Sittings Mic. 13 G. 2. quoted. 1 T. Rep. 227.

4. As to what may be given in evidence under the *alia enormia*, &c. *vid. postea*, 419.

2. OF THE PLEADINGS AND EVIDENCE ON THE PART OF THE DEFENDANT.

1. Where this action is brought jointly against the plaintiff in the former action and the officer, they may sever in their defence, for the writ would be a good justification to the officer; but if the officer joins the plaintiff in the same plea, he waives the benefit he may have himself; and if the plea is bad as a justification for the other, judgment shall also go against him. Smith v. Boucher. 2 Stra. 993. 2 Res. Phillips v. Biron. 1 Stra. 509. 2 Res.

And so if they join in the plea, and it is bad for the officer, it shall be so likewise for the other party: as here, where he did not shew the process returned, under which he justified. Middleton v. Price. 1 Wils. 17.

2. "Where the defendant justifies under process of a "court of limited jurisdiction, the plea should shew *that the* "*cause was properly subject to such jurisdiction.*"

*As where in this action the defendant justified under a prescription in the *Marshalsea court to hold plea of all causes within the verge*, and under a *capias* returnable at the next court under which the plaintiff had been arrested. This action was held to lie for such arrest, for reason that the process was ill awarded, and the arrest unlawful: 1. Because it did not appear that the *parties to the action were of the household*, between whom only the court has jurisdiction: 2dly, Because the process was *not returnable on a day certain*, but at the next court. Johns v. Smith. Cro. Jac. 314. *[337]

So

Dye v. Olive. March 117.

So where the defendant justified, under an order of a court of record in *London*, as a sergeant at mace, to arrest the plaintiff, *pro quodam contemptu*, for not paying 20*s.* to *B. G.*, which he owed him. On demurrer the plea was held to be bad, for to imprison a man *pro quodam contemptu*, is too general, and by this plea it does not appear that the Court had jurisdiction; and the officer is only to obey the order of the Court in matters of which it hath jurisdiction.

2. "Where the defendant justifies in like manner, under "process of an inferior court, and a special authority to "imprison, the plea should shew that *that authority was* "*strictly pursued.*"

Swinstead v. Lyddal. 2 Salk. 408.

For where in trespass and false imprisonment, the defendant justified under an order of the *Court of Conscience* in *London*, directed to him to arrest the plaintiff, and *carry him to the Counter*, and imprison him till he paid 9*s.* 6*d.* *virtute cujus*, he took him and detained him. On demurrer, the plea was adjudged to be bad; for the order was to imprison him in the *Counter*, which his plea should have shewn that he had done, as he confesses he took and detained him.

Adams. v. Freeman. 3 Salk. 81.

But where the defendant justifies under a process of the inferior court, it is sufficient for the defendant to allege in his plea that a plaint was levied, and process had in the inferior court, and that *superinde talliter fuit processum*, and a *capias* awarded, without setting out all the proceedings of the inferior court at length.

Middleton v. Price. 1 Wils. 17. 2 Stra. 1184.

3. Where an officer or other person justifies under *process*, which is *returnable*, he must in his plea shew *that it was returned*, or the plea will be bad.

Co. Litt. 282.

And *note*, "That the action being in its nature transitory, "the place laid in the declaration is not traversable, except "the justification extends only to a particular place."

Smith v. Hellier. Cro. Eliz. 167. *[338]

* As where to false imprisonment in *Middlesex*, the defendant justified that *Lynn* was an ancient village, and that it *usitatum fuit* to choose a mayor annually, who was keeper of the gaol, and that the plaintiff was committed to gaol on a plaint entered in the court there, *absque hoc that he was guilty in Middlesex*. The justification being local the traverse was held to be good.

4. The *statute of limitation* is a good plea in this action.

5. As to which it is enacted by stat. 21 *Jac.* c. 16. "That "all actions for assault and battery, or false imprisonment, "shall be brought within *four years* after the offence com- "mitted, or they shall be barred."

Coventry v. Apsley. 3 Salk. 420.

If the imprisonment is laid for a continued length of time, as here, from 32 *Car.* 2. till the 3d of April, 4 *Jac.* 2. the defendant may divide the time, and plead the statute of limitations as to part, and not guilty, or any other plea, to the

the rest; and in such case the plaintiff should not demur, but plead that the duress was continued.

2. "In the case of *justices of the peace* or *constables* acting "under their warrants, another limitation is made by stat. "24. *Geo.* 2. *c.* 44. which enacts, That actions against them "shall be commenced within *six months* after the offence com- "mitted, or the plaintiff shall be barred."

If a man be imprisoned by a justice's warrant the first day of *January*, and kept in prison till the first day of *February*, if the action is commenced within six months after the first day of *February*, it will be commenced in time; for the whole imprisonment is one entire trespass. Pickersgill v. Palmer. Trin. 1 Geo. 3. C. B. Bull. N. P. 26.

5. With respect to officers acting in virtue of their office, special provision is made as to pleading by them to this effect: By stat. 21. *Jac.* 1. *c.* 12. it is enacted, "That justi- "ces of the peace, mayors, bailiffs, churchwardens, and over- "seers of the poor, constables, and other peace-officers, *may* "*plead the general issue*, and give the special matter in evi- "dence. Likewise that any action brought against them "shall *be laid in the proper county*; and if, upon not guilty "pleaded, it shall appear that the fact was done in another "county, the jury shall find the defendant not guilty."

And by statute 24 *Geo.* 2. *c.* 44. it is further enacted, "That no writ shall be sued out against a justice of peace for "what he shall do in execution of his office, *till notice in writ-* "*ing of such intended writ shall be delivered to him*, or left at "his place of usual abode, at least a month before, and the "justice may tender amends; and in case the same is not ac- "cepted, he may plead such tender in bar of the action, to- "gether with the plea of not guilty, and any other plea, by "leave of the Court; and if upon issue joined the jury shall "think the amends so rendered sufficient they shall find a "verdict for the defendant." [339]

Under this clause of the statute it has been decided, That where a justice of the peace, who was also lord of the manor, went with his game-keeper to search for guns and other instruments used for destruction of the game, and seized a gun which had been left at a blacksmith's to repair; and trover was brought for the gun, that he should have a month's notice: for though under the game act, he, as lord of the manor, has power to seize guns, &c. used to destroy the game, yet here he must be presumed to be acting as a justice of peace under the power given by stat. 5 *Ann.* *c.* 14. *s.* 4. Briggs v. Sir F. Evelyn. 2 H. Bl. Rep. 114.

2. "No action shall be brought against any constable or "any other person acting by his order for any thing done in "obedience of a justice's warrant, *until demand made of the* "*perusal and copy of such warrant*, and the same has been "refused for the space of six days; and in case the warrant "has been shewn, and a copy taken, and afterwards an

action

"action brought against the constable, without making the "justice a defendant, the jury shall, on producing the war- "rant, find a verdict for the defendant notwithstanding any "defect of jurisdiction in the justice.

"And if the action be brought jointly against the constable "and the justice, upon producing the warrant, the jury shall "in like manner find for the constable.

And if the jury find against the justice, the plaintiff shall "recover from *him* the costs he has to pay the constable; "with a proviso, that if the judge certifies that the injury "was wilfully and maliciously committed, the plaintiff shall "be entitled to *double costs*."

The several constructions on this statute are:

1. AS TO JUSTICES OF PEACE.

Lawrence v. Cox. Hill. 35. G. 2 B. R. Bull. N. P. 24.

1. If the justice pleads tender of amends under this stat. 24 *Geo.* 2. the plaintiff may have a rule for the defendant to bring the money into court, for the plaintiff to take the same, on his discontinuing the action.

Casbourn v. Ball. 2. Bl. Rep. 859.

2. Though the justice has omitted to tender amends, yet he may have a rule to pay a sum of money into court as amends; but it must appear, before this is allowed that the action is brought against the justice *for something done as a justice in the execution of his office*. In this case the motion was to that effect, and the court granted a week's time to plead; in which time it appearing from the plaintiff's notice of action that the defendant was sued as a justice of peace, the Court made the rule absolute as above.

Hill v. Bateman. 1 Stra. 710. 2 Ras.

3. If the action is brought for an illegal commitment, or any other unlawful act against the justice of peace, he is obliged to shew the regularity of his proceedings, and the information, &c. laid before him, upon which his proceedings or convictions were founded, must be produced and proved in court.

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Entick v. Carrington. 2 Wils. 275.

4. *A secretary of state* is not a justice of peace, nor his *messengers* constables, within the stat. 24 *G.* 2.

2. AS TO INFERIOR OFFICERS.

1. "The privileges given to constables and inferior offi- "cers under these acts, are confined to cases in which they "*are acting in execution of their offices*."

Anon. 1 Stra. 446.

For where the constable and another quarrelled, and the constable beat the other, this happened at *Dover*, and the action was brought in *Middlesex*, when the constable insisted the action should be brought in the proper county, by stat. 21 *Jac.*; but the objection was overruled, for that statute is confined to cases in which the constable is acting in execution of his office, and this was a private quarrel.

2. The

2. The protection afforded to the constable or inferior officer under the statute, is only while *acting in obedience* to the justice's warrant: therefore the defendant must always shew that he did so act: and where the justice cannot be liable, the officer is not within the protection of the act; therefore it is no justification, if directed to him to take up one person, and he takes up another; for such is not in obedience of his warrant. Money v. Leach. 3 Burr. 1742.

3. An *overseer of the poor*, who distrains for a poor's rate, under a justice's warrant, is an officer within the protection of the act. Nutting v. Jackson. Pasc. 1 Geo. 3. B. R.

4. "The act only extends to actions brought against officers for *torts* committed by them in the execution of their office, not for actions of another nature." Bull. N. P. 24.

For where the action was *assumpsit* for money had and received, to recover back from the officer the money levied by him on a conviction which had been quashed, it was adjudged, That a demand of the copy of the warrant under the statute was not necessary. Feltham v. Terry. Pasc. 13 Geo. 3. B. R. Bull. N. P. 24.

4. OF THE VERDICT AND DAMAGES.

1. "The jury can only give damages in this action to the time of the action brought."

For where it was for false imprisonment for four months, from the *1st of October*, and damages entire, and the declaration was of *Michaelmas* term, and so damages were given for part of the time after the action commenced; judgment was arrested. Bonafield v. Lee. 1 Lord Raym. 329. [341]

But where the imprisonment was so laid, *viz.* for twenty-five weeks, from the 18th of *October*, and the declaration was of *Michaelmas* term, and verdict for the plaintiff; it was moved in arrest of judgment, That the action was brought too soon, and it appeared that damages had been given for an imprisonment long after the action had been depending: but it was resolved that the *continuando* being laid under a *scil.* would not vitiate what was properly laid in point of time, and the plaintiff had judgment. Webb v. Turner. 2 Stra. 1095.

2. How far (when this action is brought jointly) the jury may sever in the damages *vid. ch. Trespass*, under the head *Verdict*, the case there applying here.

By statute 5 *Geo.* 13. all writs of error wherein there shall be a variance from the original record, or other defect, shall be amended.

Verelst & Smith. v. Rafael. Cowp. 425.

Therefore, where an action of false imprisonment was brought against *Verelst* and *Smith*, but *Verelst only was found guilty:* by mistake a writ of error was brought in the name of *both*, and the court allowed it to be amended, by striking out the name of the defendant below, who had been acquitted.

For costs to the defendant, *vid. Action of Assault*, the law being the same.

CHAPTER VI.

The Action of Adultery.

THE ground of this action is the injury done to the husband, by alienating the affections of his wife, destroying the comforts arising from her company and that of her children, and imposing on him a spurious issue.

The principal matters to be considered in this action are, 1. The Evidence necessary to maintain it: 2. The Damages: 3. The Pleadings and Costs.

1. OF THE EVIDENCE.

1. "Plaintiff must bring proof of the *actual solemnization* "*of a marriage*; nothing shall supply its place: cohabitation "or reputation are not sufficient, nor any collateral proof "whatever."

As where the plaintiff, in this case, proved articles made after marriage with his wife, for the settling of the wife's estate, within the privity of the relations on both sides, cohabitation, name, and reputation: he proved further, that the defendant, on being asked where Mrs. *Morris* was, answered, In the next room: she being there with him. So that he confessed that he had committed adultery with the plaintiff's wife, which it was contended was an admission of the marriage; but it appearing that the marriage had been celebrated in *Mayfair* chapel, but the register or book could not be admitted in evidence (stat. 26 *Geo.* 2. *c.* 3. *s.* 14.,) the minister who had married them having been transported, and the clerk being dead; for want of proof of an actual marriage, the plaintiff was nonsuited.

Morris v. Miller. 4 Burr. 2057.

But proof of the marriage, either by a copy of the register of the church where the ceremony was performed, or by the testimony of one who was present at the ceremony, will be sufficient.

Bull. N. P. 27.

And the copy of the register is of itself sufficient evidence of the marriage, *without proving the identity of the parties*; for marriage-registers are as records.

Birt v. Barlow. Dougl. 162.

In an action for *crim. con.* the marriage was proved by a person who was present when it *was solemnized in the Fleet in the year* 1737, and the plaintiff's counsel offered to give in

Howard v. Burtonwood. C. B. Sittings West. Trin. 1776. M. S.

Read v. Passer. Espin. N. P. Cas. 213. S. P.

in evidence the *Fleet* register, as a confirmation of the testimony. Chief Justice *De Grey* refused the evidence, and said, The ground of rejecting the evidence was that the whole of the transaction was illegal; and the register made by a person under no tie, and therefore not entitled to credit.

Woolston v. Scott. Per Dennison, Justice, at Thetford, 1753. Bull. N. P. 28.

But it is not necessary to prove a *marriage according to the ceremony of the church of England*; it is sufficient, if the plaintiff is of any religious sect, to prove a marriage according to the rites and ceremonies of that sect; as *Jews, Quakers, &c.*

Baker v. Morley. Guildhall, 1739. Bull. N. P. 28.

2. The confession of the wife will be no proof against the defendant; but a discourse between her and the defendant may be proved: so letters written to her by the defendant may be read as evidence against him, though her letters to him will be no evidence for him.

Leader v. Barry. Espin. N. P. Cas. 353.

3. A copy of the register of a foreign chapel is not evidence to prove a marriage; but in all cases except for adultery, the acknowledgment of the parties, and the reception by their friends as man and wife, is sufficient proof of their marriage.

2. OF THE DAMAGES.

Bull. N. P. 27.

1. The injury in the case of adultery being great, the damages are generally considerable; but they depend upon circumstances; that is, they are increased or diminished from the consideration of the rank and quality of the plaintiff: so from the peculiar turpitude of the case, as if the defendant was the friend, relation, or dependent of the plaintiff: so if it appeared that the plaintiff and his wife lived happily before that transaction and acquaintance with the defendant: so that the wife had always borne a good character till then: so that there was a settlement and provision for the children of the marriage: all these go in aggravation of the damages, in which also the circumstances and property of the defendant are always considered.

Bull. N. P. 27.

2. On the other hand, many circumstances go in extenuation of the offence, and mitigation of damages: as if it appears that the plaintiff encouraged the defendant's addresses to his wife, or connived at it.

Sir R. Worsley v. Bisset. Sittings after Hil. 1782. *[344]

*As in this case where it appearing that this was the case from many circumstances; one in particular, from his shewing his wife naked when going into a bath, to the defendant; the plaintiff, though a man of rank, obtained but one shilling damages.

S. C.

So the defendant may give in evidence that the plaintiff's wife had been criminal with others.

So

So it may be proved that she eloped before ; or that the husband turned her out of doors, and refused to maintain her, and that he kept company with other women ; or that he consented to the defendant's familiarity with her ; all these are proper evidence in mitigation of damages. Bull. N. P. 27. Cibber v. Sloper. Per Lee. ibid.

So the defendant may give in evidence that the wife had a bastard before marriage : but he will not be permitted to give evidence of the general reputation of her being a prostitute, or having been so ; for that may have been occasioned by her familiarity with the defendant himself : though perhaps, after having proved her criminality with other men, it may be admitted to go into evidence of her general character. Roberts v. Marlston, at Hereford, 1756. Per Willes, C. J. Rigby v. Stephenson, at Stafford, 1765. Per Foster, Just. Bull. N. P. 27.

3. In this case it was laid down by Lord *Mansfield* as clear law, That if a woman is suffered by her husband to live as a prostitute, and a man is thereby drawn into *crim. con.* that no action will lie at the suit of the husband ; for it is a damage without an injury ; but if the wife lives in such a state of prostitution without the privity of the husband, it will not bar the action, be she ever so profligate, but only go to the damages. *Pratt*, Ch. Just. declared himself of this opinion about the same time. Smith v. Allison. Per Lord Mansfield, Sittings aft. Tr. 5. G 3. Bull. N. P. 27.

In an action for *crim. con.* with the plaintiff's wife, it was proved that they had separated and then lived apart ; the husband, upon suspicion of her misconduct, having put her to board and lodge, and agreed to pay for it : the acts of adultery proved were after this separation. Lord *Kenyon* ruled, That the action would not lie, as the ground of this action was the depriving the husband of the society and comforts from the company of his wife. He therefore non-suited the plaintiff. Weedon v. Timbrell. Sittings after Easter 1793. G. H. 5 Term Rep.

It is said indeed, in this case, that though the husband's privity and consent to the defendant's familiarity and connexion with his wife was clearly proved, yet that the action was held to lie : but the distinction between this case and that before laid down by Lord *Mansfield*, is easily settled ; the doctrine laid down by his lordship being of an indiscriminate prostitution, this only of a criminal connexion with one person. Bull. N. P 27. Cibber v. Sloper. ante.

Contra per Lord Kenyon. 4 T. Rep. 651.

3. OF THE PLEADINGS AND COSTS.

The declaration in this case states the offence, by making an assault on the wife, &c. &c.

On this two cases have occurred :

1. As to the Pleadings : 2. As to Costs.

*In actions of assault the time of limitation is four years : but in this action the gist of the action being the criminal conversation Cooke v. Sayer. Mic. 23 Geo. 2. B. R.

Bull. N.P 28.
2 Burr. 753.
S. C.

conversation and not the assault, not guilty within *six years* is the proper plea under the statute of limitations: it being declared on as case for the criminal conversation.

2. As to Costs.

Batchelor v. Bigg.
3 Wils. 319.
2 Bl. Rep. 855.

This action is not considered so far an action of assault, that in case the plaintiff has a verdict with damages under forty shillings that he shall lose his costs: for the special injury being the ground of the action, he shall have full costs, though the damages are under forty shillings.

Duberly v. Gunning.
4 T Rep. 651.

And *note:* This action being founded on a tort, the Court refused to grant a new trial in this case on the ground of *excessive damages*, though it appeared that the husband had been grossly culpable, even so far as would have justified a verdict for the defendant. The damages were 5000*l.*

CHAPTER VII.

The Action of Replevin.

1. REPLEVIN is a remedy grounded on a distress, being a re-deliverance to the first possessor of the thing distrained, on security given by him to try the right, and to re-deliver the distress if judgment be against him.

In treating of this action, I shall first consider the *Proceedings* by which Replevin is made: 2dly, The *Pleadings*; under which I shall consider, 1. The Nature of the Action, with reference to the *Things* for which it lies: 2. With reference to the *Person*: 3. *The Judgment, Costs, and Damages.*

1. OF THE PROCEEDINGS IN REPLEVIN.

These proceedings are either by common law or by statute; That is, by *writ* or by *plaint*. Co. Litt. 145. b.

1. The proceedings at common law were by *writ issuing out of Chancery*, commanding the sheriff to cause the goods taken to be re-delivered to the owner, under this writ the sheriff might act *judicially*, and *inquire in his own court* whether the caption was just or not, and give judgment accordingly; and this was for the speedy determination of those causes in which the people might want their cattle. 2 Inst. 140.

But still there was an inconvenience in applying to *Chancery* for the writ, on account of the distance and delay. This was remedied by the statute of *Marlbridge*, 32 *H.* 3. *c.* 21., which orders, "that the *sheriff*, on complaint made, "shall re-deliver the beasts taken."

This is the statute mode of replevin by *plaint*, as founded on the sheriff's precept to re-deliver the beasts distrained, grounded on the party's complaint. And for the still further convenience of the people, it is ordered by stat. 1 & 2 *Ph. & M. c.* 12. "That within two months after he re- "ceives his patent, or at his next county court, that the "*sheriff shall depute four persons*, dwelling at least twelve "miles from each other, to issue replevins; and the statute "gives a penalty of 5*l. per* month for every month he "neglects." [347]

The

Co. Litt. 145. b. The sheriff, under this act, may issue his replevin at any time; for it would be inconvenient to make the parties wait till the county-court day.

Hale's P. N. B. 169. 4 Inst. 139. 2. The sheriff may, on complaint made, order his bailiff to make replevin, either by his precept directed to him or *by word*. But in such case, if done in the interval between the times of holding the county-courts, he must enter the plaint at the next court.

But before the actual issuing of the sheriff's precept to replevy, the party replevying is bound to find *plegii de retorno habendo*. The reason of which was, that as the common law replevin was by original writ, the plaintiff only gave the nominal *plegii de prosequendo*; the consequence of which was, that it often happened that after the plaintiff had got possession of his goods or beasts, which had been distrained, that he sold them; and though the defendant might afterward have judgment *de retorno habendo*, that they were not forthcoming. This was remedied by statute of *West. 2. c. 2.* which ordered, "That the party, on suing "out his replevin, should find pledges *de retorno habendo*: "and if the pledges were insufficient, that the sheriff should "answer."

Dorrington v. Edwin. 3 Show. 420. 1. Under this statute, therefore, the sheriff, whether the replevin is by writ or plaint, before he grants the one or executes the other, must take pledges as well *de prosequendo* as *de retornio habendo*.

Dalt. 440. 2. The *plegii de retorno habendo* may be *by bond*, and that too of the plaintiff in replevin himself, the condition of which should be, not only that the plaintiff would prosecute the suit, but also that he would make return of the beasts, if so adjudged in law, and also save harmless the sheriff for their delivery.

Moyser v. Gray. Cro. Car. 3aa. 3. But the sheriff cannot take *money or cattle* as a pawn or security, in the nature of pledges *de retorno habendo*; for the process to bring the pledges into court is by *scire facias*, to shew cause, &c., and so to have money or goods, as pledges would be an absurdity.

Richards v. Acton. 2 Black. Rep. 1020. *[348] *4. If insufficient pledges *de retorno habendo* are taken, the sheriff, the under-sheriff and the replevin-clerk (that is, the officer appointed to make replevins, under stat. 1 & 2 *P.* & *M.*) are all liable to the defendant, who has judgment *de retorno habendo*.

Dorrington v. Edwin. 3 Mod. 56. If the proceedings are by plaint, and removed by *certiorari*, and the defendant has judgment, he may have a *scire facias* against the pledges.

Prowse v. Pattison. Hil. 13. Geo 2. Bull. N. P. 60. But he may have his *action on the case* against the sheriff if the pledges are insufficient, without any previous *scire facias* against them.

Though

Though he has a more summary mode by motion, as was the case of *Richards* v. *Acton*, *supra*.

In the proceedings against the sheriff, some evidence must be given by the plaintiff of the insufficiency of the pledges or sureties; but very slight proof is sufficient to throw the proof on the sheriff: for the sureties are known to him, and he is to take care that they are sufficient; as if he does not produce or name them, it is sufficient to charge him. *Richards* v. *Acton* *supra*.

Saunders v. Darling. Sittings Trin. 10 G. 3. C. P. Bull. N. P. 60.

5. Besides those pledges which are discretionary in the sheriff, he is ordered by stat. 11 *Geo.* 2. *c.* 19. "To take *a* "*bond with two sureties* in a sum double the value of the "goods distrained, conditioned to prosecute the suit and to "return the goods if a return is awarded; which bond may "be assigned to the defendant; and if forfeited, may be sued "in the name of the assignee.

But if the sheriff neglects to take a replevin-bond, the Court will not grant an attachment against him, but leave the party to his action against the sheriff.

Rex v. Lewis, 2 Term. Rep 617.

And where an action is so brought against the sheriff for taking insufficient pledges, the *sum recovered shall be only to the amount of the distress*, not to the sum which might have been recovered against the plaintiff in *replevin*, for as, if he had taken a bond to return the things distrained, and as the condition of this bond would be satisfied by returning the goods themselves, he cannot be liable beyond their value.

Yea v. Lethbridge, 4 T. R. 433.

On this point there has been a difference of decision between the courts of *King's Bench* and *Common Pleas*, the latter having held, That in an action against the sheriff for taking insufficient sureties in replevin, the plaintiff may recover more than the penalty; that is, more than double the value of the thing distrained.

Concanen v. Lethbridge. 2 H. Bl. Rep. 36.

3. When, therefore, the sheriff has taken these steps, he must then issue his precept, directed to his bailiff, to make replevin, and cause the goods to be delivered to the plaintiff.

Hale's P. N. B. 168. 2 Inst. 139. 140.

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And, by stat. of *Marlbridge*, "If the replevin is to be "made within a liberty in the county, the sheriff shall make "his precept to the bailiff of the liberty, to make deliver-"ance; and if he neglects, or makes no answer, the sheriff "shall, without further notice, do it himself."

And, by the same statute, "If the distress had been made "in the county at large, but impounded within the liberty, "the sheriff might, without any previous warrant to the bail-"iff, enter the liberty and make the replevin;" for the caption, which is the thing complained of, was in the county at large.

And by stat. *West.* 1. 3 *Ed.* 1. *c.* 17. "If the distress had "been driven into any strong hold, the sheriff, after demand, "might break open doors to make replevin."

Dalt. 438. Hale's P. N. B. 169.

4. When the sheriff has therefore given possession of his goods to the plaintiff, if the replevin has been by plaint, the defendant has a day given to him in court to appear. If the replevin has been by writ *alias* or *pluries*, there no day is given, for the plaintiff has possession of his own goods; and as the defendant is supposed to have a demand against him for which he distrained, it is his business to make the plaintiff declare: for which purpose he may at any time have a rule of court to compel the plaintiff to declare. So the plaintiff may of his own accord come into court and declare, after which the defendant is by attachment brought into court to plead.

Gawen v. Ludlow. Roll. Ab. 581. Dalt. 440.

5. But as it often might happen that the sheriff might be partial or negligent, or the matter might be of considerable consequence, in such case the replevin may be removed into the courts above.

2 Inst. 139.

This is by writ of *pone* or *recordari*, the difference of which is, that the *pone* lies where the proceedings in the county court have been by *writ*; but the *recordari* where they have been by *plaint*: which proceedings the sheriff is ordered by the writ to record and certify them to the court above.

The *plaintiff* may sue out either writ *without any cause shewn*, because it is his own delay; *but the defendant must assign a cause.* And these are good ones: That either party is related to the lord or sheriff; that they are interested, *&c.* And by stat. *West.* 2. *c.* 2. "If the distress had been made "for customs or services, and the plaintiff pretends to be out "of the fee, this was good cause to remove the cause to try "the tenure."

[350]

2. OF THE PLEADINGS IN REPLEVIN.

When therefore the plaintiff is brought into court, or comes voluntarily, the first step is to declare.—I shall therefore first consider the

DECLARATION.

1. The writ of replevin complains of two things; 1st, The unlawful *taking*; 2dly, The unjust *detention*. In the declaration it is therefore to be observed,

Petree v. Duke. Lutw. 1150. Hale's P. N. B. 169.

2. That if the sheriff has to the writ returned *replegiari feci*; there the replevin goes only for damages for the caption, and the declaration is in the *detinuit*: but if the sheriff has not made the return of *replegiari feci*, there the declaration must be in *detinet*, for the plaintiff in the latter case has no

not possession of his goods or cattle ; and he shall in this case recover as well the value of his goods, as damages for their unjust detention.

2. " The declaration should be certain in setting out the " number and kind of cattle or goods distrained ;" for otherwise the sheriff would not know how to make deliverance, if it should be necessary: Though this fault might be cured by the avowry, both parties agreeing on the number and nature of the things taken. Moore v. Clipsam. Stile 71.

But in such case the sheriff may require the defendant to *shew him the goods*. And it would be a good return to say, *nullus venit ex parte defendentis ad ostendendum bona & catalla.* Bull. N. P. 53.

On this ground a declaration in trover *de una parcella lintei*, was held ill for the uncertainty of the description. Kempster v. Nelson. Gilb. Rep. 233.

But a declaration for fourteen skimmers and ladles was held to be good. Brown v. Mattaire. 2 Stra. 1013.

3. It is not sufficient for the plaintiff to state generally in his declaration the taking in such a vill or place generally for a venue ; but he must particularly set it out " *as a certain "place called*," &c.; for by alleging the vill generally, perhaps the defendant might have a right of freehold there himself; but by mentioning the particular place in the court, it shews the defendant to what to make title. But this should be taken advantage of by special demurrer. For if the defendant does not demur, but pleads *non cepit*, the count shall stand ; for if there was no taking, the place is immaterial. Read v. Hawke. Hob. 16. Ward v. Laville. Cro. Eliz. 896. [351]

But where the defendant so pleads *non cepit*, the plaintiff must prove the taking *at the place mentioned in the declaration*; for as the defendant on this issue does not insist upon a return, but denies the taking, the place is material to ascertain the fact as laid. Johnson v. Woolley. 1 Stra. 507.

4. The plaintiff may declare for several takings, and at several places ; part at one time or place, and part at another : And if the plaintiff alledges two places, and the defendant answers only to one, that is, if the plea begins as an answer to the whole, which in fact is but an answer to a part, it is a discontinuance, and the plaintiff must not demur, but take his judgment for that by *nihil dicit*; for if he demurs or pleads over, the whole action is discontinued. Hale's P. N. B. 168. Bull. N. P. 54. Weeks v. Speed. Salk. 94. Ib. Salk. 17.

2. OF THE PLEAS BY THE DEFENDANT.

Pleas by the defendant are either in abatement or in bar.

1. PLEAS IN ABATEMENT

Are either such as *of themselves* induce a return, or such as *require a conusance or claim.*

As

Wildman v. North. 2 Lev. 92.

As, first, If the defendant pleads "*that the goods are the* "*property of himself, or of a stranger,*" this plea neither denies, confesses, nor avoids the caption, but shews that the plaintiff not having any property in the goods, has no right to have them delivered to him; that therefore the writ should be quashed, and he (defendant) have a return of the goods.

Butcher v. Porter. Salk. 94.

Therefore in pleading such matter, the defendant need make no claim or suggestion to entitle him to a return, because he had possession of the goods before the replevin, of which he was deprived by the plaintiff, who had no right.

2. As to the second case,

Co. Litt. 145.

If the defendant pleads "that the goods were the property of the plaintiff *and another person,*" as this plea only goes to the form of the writ (the plaintiff alone not having the property) the defendant must add a conusance or claim to entitle him to a return.

Foot's case. Salk. 93. *[252]

*So if the plaintiff declares of a taking *in one place*, and the defendant pleads that he took the goods *at another*, in this case he must make conusance or avow for a return; for such plea does not disaffirm property in the plaintiff; and the defendant must shew a right either of possession or property to have a return.

Watts v. Hagden. Cro. Eliz. 372.

And in such case the plaintiff ought not to traverse the matter of the conusance; if he does, and demurrer be joined on it, it is a discontinuance, and the defendant shall have judgment on it. He should only reply to the place traversed; for to reply to the conusance would be to plead double.

Co. Litt. 145. b.

For *note*, That it is a general rule that the plaintiff must have the property of the goods in him at the time of the taking, or he cannot maintain replevin: but a special property will be sufficient to maintain the action. Therefore if the defendant claims property in the cattle or goods, the sheriff cannot make replevin, for that might be to give the goods to a person who had no right to them. This is where the replevin is by plaint; and in such case the plaintiff may have a writ *de proprietate probanda* directed to the sheriff, who is by an inquest to inquire into the property, and if it be found for the plaintiff, he must make deliverance; but if for the defendant, he can proceed no further. But if the replevin has been by writ, if the defendant claims property, the sheriff *should make his return to that effect*, and the suit shall go on in the *Common Pleas*, where the property shall be finally tried. It is in this stage the pleas beforementioned come into question.

Ib.

2dly,

3dly, Pleas in bar are the following:

1. The general issue: 2. The statute of limitation: 3. A justification: 4. The avowry or conusance. And,

1. OF THE GENERAL ISSUE.

The general issue in replevin is *non cepit*; and this plea confines the issue to the *taking*, for it allows the property to be in the plaintiff; and therefore that being admitted by the plea, no evidence shall be admitted to disprove it. Bro. Rep. 5.

2. If the defendant pleads *non cepit*, if he does not insist on a return, he may prove the taking to be at a place different from that laid in the declaration, and it shall be good. 1 Stra. 507. Bull. N. P. 54.

This is provided the defendant never had the cattle in the place mentioned in the declaration at all: for if the plaintiff can prove that the defendant had them in the place laid, he will have a verdict; though if the fact is, that the defendant took the cattle at another place, and only had them in the place mentioned in the declaration, in the way to pound, he ought to shew the matter specially. [353]

2. OF THE PLEA OF THE STATUTE OF LIMITATIONS.

2. It is enacted by stat. 21. *Jac.* 1. *c.* 16. "That actions "of replevin, must be brought within *six years* after the "cause of action accrued; so that the statute of limitations "is a good plea in bar."

3. OF THE PLEA OF JUSTIFICATION.

"A plea in justification admits the caption, but denies the "injustice of it."

1. As is the plea *claiming property either in the defendant himself or in a stranger*, which, before it was shewn, might be pleaded in abatement: but it may also be pleaded in bar, as it destroys all right of action in the plaintiff: for if the property is in the defendant himself, it is clear; and if it is in a stranger, the defendant is intitled to hold the goods against all persons but the stranger himself, and therefore has a right to return. Presgrave v. Saunders. Salk. 5. Wildman v. North 2 Lev. 92.

Therefore, where the defendant pleaded, That at the time of the taking, the property was in Lord *North*, not in the plaintiff, he was held to be intitled to a return. Sir Nicholas Bacon's case. Cro. Eliz. 475.

2. A distinction is to be observed between an avowry and a justification.

An avowry always goes for a return, and therefore shews a subsisting right at the time of the avowry, as made for rent, *ex. gr.* but *a plea in justification does not always go for a return.* As, for example, Where the original taking was lawful, but is not so at the time of the plea pleaded. Buller N. P. 55. Danv. Ab. 652.

As

Roll. Ab. 319. As where the lord distrained for homage, the tenant died, and then his executors brought replevin, the lord should *justify the caption*, because it was lawful when made: but it not being lawful to detain the goods after the tenant's death, he therefore could not *avow*; for he was not entitled to a return, though he was exempt from damages.

4. OF THE AVOWRY.

[394] An avowry is an acknowledgment by the defendant of the taking of the beasts or goods, and setting forth the cause of taking them, for the purpose of having a return.

If the defendant was not acting in his own right, but as bailiff to another, he is not said to *avow*, but to make *cognizance*.

Under this head I shall consider, 1. The form, or how the avowry is made: 2. The avowry considered with reference to the things for which it lies, which includes, 1st, For what good causes it may be made. 2dly, For what it cannot be made, 3dly, Of the avowry with reference to the persons making it.

1. HOW THE AVOWRY IS TO BE MADE.

1. At common law the lord was obliged to avow on his real tenant. When alienation became frequent, this was attended with much difficulty, but was remedied by stat. 21 *Hen.* 8. *c.* 19. which enacted "That the lord might distrain on the lands "holden of him, and avow generally, as within his fee, without naming any tenant in particular."

9 Co. 32. a. 1. Though the words of the statute are, that the lord may distrain *on the lands* within the lord's fee; yet *if the beasts have been driven off*, but pursued by fresh suit, the lord may distrain *off* the lands.

Co. Litt. 268. b. 2. Notwithstanding the statute, the lord may still avow, either at common law or under the statute, at his election; for the words of the statute are, *may* avow.

Ibid. 3. Though the lord may avow without naming any person against whom he so avows, yet he must allege seisin by the hands of some certain tenant, within forty years.

Ibid. 4. If the defendant avows, according to the statute, every plaintiff in the replevin or second deliverance, may avail himself of every answer to the avowry that is sufficient, except disclaimer, which he cannot have as the lord avows upon no one certain. *c.* 4. stat. 21. *H.* 8.

Lucy v. Fisher. Cro. Eliz. 146. 5. The defendant in his avowry in this case, *mentioned the name of the tenant*, which the statute does not require, but concluded, "*secundum stat.*" &c. It was nevertheless held well

well within the statute, though the name should not have been mentioned.

6. Where the tenant conveyed to the king, and the king granted the land over to *B.* it was held that the lord could not avow upon *B.*; for by the tenant's grant to the king, the tenure was at an end, as the king could not hold of a subject: therefore the lord should have declared according to the circumstances of his case. Broker v. Smith. And. 159. [355]

Note; If in replevin either party avows or justifies under a particular estate, the commencement of it must always be shewn. Scilly v. Dally. Salk. 562. Co. Litt. 283.

This statute is general, and extends to all distresses made by the lord, as for rents, customs, services, &c.

And its provisions have been more universally extended, as will appear under the head of Rents.

These cases go to the form of pleading. I shall now consider *Replevin with reference to the things for which it lies; or what are good causes of Avowry*, and for what it cannot be made.

I. WHAT ARE GOOD CAUSES OF AVOWRY.

Wherever the party has a right to distrain, there he may well avow the taking.

Under this, it will therefore be for consideration for what causes by law a distress may be made.

These are, 1st. For rent arrear. 2dly, For damage feasant. 3dly, For fines or amercements in courts leet or baron. 4thly, For tolls or customs. 5thly, For suits or services claimed by custom of the manor. 6thly, For Poor's rates.

And, First, Of distress for

RENT-ARREAR.

By the common law a power of distraining for rent was annexed to the person to whom the fealty of the land belonged: and whenever he made any grant reserving the fealty, and rent to himself, this was called *rent-service*, and for it by common law, he could distrain. Co. Litt. 142.

But where he parted with the whole fee, reserving a rent, but in the grant reserved a power of distress, if the rent was in arrear; in that case, as the power of distress arose, under the grant, it was called a *rent-charge*. Ibid.

Rents sec are rents granted in like manner as rent-charges, but with no clause in the grant reserving the power of distress: for these, therefore, no distress could be made at common law. But it is now enacted by statute 4 *Geo.* 2. c. 28. Litt. s. 218.

c. 28. "That rents sec, rents of assize, and chief rents, may now be distrained for: so that now all rents are on the same footing, in point of distress.

Brown v. Dunnery. Hob. 208.

But 1st, if the clause in the lease is, "That if the rent be behind, *being demanded at another place beside the land, or of the person of the lessee*, that the lessor may distrain:" there, *if the lessor distrains without any demand*, it is unlawful; for the form of the demand is different from what the law requires, and must be complied with.

Maud's case. 7 Co. 28. b.

But, if the clause is, "That if the rent be behind, *being lawfully demanded*, that then he may distrain; it is no more than the law speaks, and therefore *the lessor may distrain without a previous demand*: for the distress is itself a demand.

"But where there is any *penalty annexed* to the non-payment of the rent, and a distress given for it, there a demand must be laid."

Howell v. Sambach. Hob. 133.

As where the avowry was for rent and a *nomine pœnæ*, and no demand alleged, the avowry was held to be clearly ill for the *nomine pœnæ*, for the want of a demand, but good for the rent: and the defendant had return for that.

Sir T. Wentworth's case. Hutt. 42.

But where the issue was on a collateral matter, *viz. non concessit*; though there was no demand laid of the *nomine pœnæ*, it was held to be cured by a verdict.

Fairfax v. Grey. 2 Black. Rep. 1326.

2. Where the plaintiff who was tenant in fee, granted lands to trustees to the use of the defendant for ninety-nine years, the trust of which term was to secure an annuity of 250*l. per annum* to the defendant with power of distress, if in arrear, and he had distrained; it was objected, that the legal estate being vested in himself, that he could not distrain upon lands in his own possession; but the Court overruled the objection, holding the grantor to be *quasi* tenant to the defendant at a rent to the amount of the annuity.

3. "Where a man is *sole seised, or has title to an entire rent*, "he should distrain for it all at once; for the law will not "allow multiplicity or splitting of actions."

Sir Th. Holt. v. Sambach. Cro. Car. 103.

And therefore if the defendant avows for half a year's or a quarter's rent, *he should set out how the rest was satisfied*; for otherwise there may be another distress and avowry for the residue.

"But if the defendant avows for more than is due, "though the avowry is for that reason bad, yet it may be "cured."

Richards v. Cornforth. Salk. 580. 3 Co. 45. b.

*As where he avowed for rent due at *Michaelmas*, and the distress appeared to have been made on the 26th day of *September*; which was three days before *Michaelmas*; it was held, That though the avowry was bad (for the judgment

is

it to have a return irreplevisable *till all the rent avowed for "s paid*, and so would be for more than was due) " yet that " the defendant might, before judgment, *abate his avowry for so much as was claimed to Michaelmas*, and take his judgment for the rest.

" But where one is not so seized, or *has not a sole title to* " *the whole rent*, he cannot avow alone, or his avowry shall " be bad."

As where in replevin the defendant made *conusance* as bailiff to the Countess of *Salisbury*, for rent-arrear, and shewed that the lessor was seised in fee, and died, and the reversion descended to the Countess of *Salisbury and her sister*: on demurrer, the Court held the conusance to be bad; for the rent is an entire inheritance, and the two sisters make but one heir, and so should have joined. Stedman v. Bates. Salk. 590.

" Where lessee has entered under a lease, though *his entry* " *has been tortious*, yet it seems that that shall not avoid the " payment of the rent, but the avowry for it be good."

For where in replevin the defendant avowed for rent, under a lease dated the 24th of *June, habend. a prad.* 24 *June*, &c. *virtute cujus*, the plaintiff *entered on the said 24th of June*; on demurrer it was objected, That the plaintiff was a disseisor, by entering on the 24th, when his lease did not commence till the day after, and consequently that the possession was not under the lease, but by virtue of a tortious fee; but the court gave judgment for the avowant, for that there was a great difference between this case and an ejectment; *for here, be the entry tortious or not; it does not discharge the contract for the payment of the rent.* Macdonnel v. Welder. 1 Stra. 550.

5. " Though the defendant may have good title to the " rent, yet may the distress be tortious."

As if he comes on the land to distrain, and *the tenant then tenders the arrears due*; in such case, if he distrains the cattle, it is tortious, and the defendant may replevy. 8 Co. 147. a.

But it is not sufficient for the tenant to say that he was on the land on the day, and ready to pay the rent; for if he did not make a *tender at the time of the distress made*, the taking is not tortious. Crawley v. Stillingworth. Hutt. 13.

And *the tender must be before the impounding*; for then the goods are in *custodia legis*. Pilkington v. Hastings. Cro. Eliz. 813.

6. Many difficulties formerly occurred in avowries, from the circumstance of requiring the defendant to set out his title at large. [368]

This has been remedied by statute 11 *Geo.* 2, *c.* 19. which enacts, " That the defendants in replevin may avow generally, that the plaintiff held under such an article, &c. at such

" certain rent, during the time that the rent so distrained
" for incurred, which rent still remains due," *without setting out the grant, tenure, or title of such landlord or lessor.*

Sullivan v. Stradling. 2 Wils. 208.

This statute was made for the benefit of landlords, that after the tenant had enjoyed the land, he should not be allowed to pry into the lessor's title: therefore, if the defendant avows under the statute, *nil habuit in tenementis is a bad and inadmissible plea*, for it attempts to bring the lessor's title in question; for if the premises were in mortgage, for example, the defendant, if this plea was allowed, could not recover his rent, which the statute never had in contemplation to prevent, but rather to assist.

Adams v. Cross. 1 Vent. 182.

Before this statute, *in cases of copyhold*, where the title did not come in question; in avowry for rent, it was sufficient for the defendant to state his being seised, &c. according to the custom of the manor, at the will of the lord, without *stating any admission* under the surrender.

7. By stat. 32 *H.* 8. c. 37. " *The executors and administrators of* tenant in fee, in tail, or for life, of rent-services,
" rent-charges, rent-sec, or fee-farms, may distrain upon the
" lands chargeable, so long as they remain in the tenure and
" occupation of the tenant who ought to have paid, or
" any person claiming under him by purchase, gift, or de-
" scent."

" And the same remedy is given to husbands seised in
" right of their wives or other persons, after the death of
" *cestui que vie.*"

Under this statute it has been held,

1. " That it extends but to the *persons mentioned in it*, or
" *executors*, &c. not to others, though in similar circum-
" stances."

Hool v. Duncomb. Trin 1657. Bull. N. P. 56.

As where tenant for life of a rent-charge confessed a judgment, and an *elegit* issued, under which the rent-charge was extended: tenant for life died, and the *conusee distrained and avowed* in replevin for the arrears incurred in the lifetime of the tenant for life: on demurrer, it was held to be a bad distress, and not warranted by the statutes: 1st, Because the case of a *conusee* is not enumerated in it: 2dly, Because he comes in the *post*, *not under* the tenant for life.

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Co. Litt. 162.

2. The words of the statute are, " of tenants in fee-tail, or *for life*." This, Lord *Coke* says, is to be intended of tenants *pur auter vie*, so long as *cestui que vie* lives, who may distrain under the statute, though by common law they could not do so.

Hool v. Bell. 1 Raym. 173.

But it has since been extended to all *tenants for life*, as to the executor of the grantee of a rent-charge.

The

The statute makes no mention of *leases for years*, and therefore it should seem that the *executors of lessee or grantee of a rent charge for years, if he so long lives*, were not within the statute, and so could not distrain for arrears due in the life-time of their testators; for he was not tenant in fee-simple, fee-tail, or for life, of such a rent. Turner v. Lee. Cro. Car. 471.

However in an action of trespass for distraining the plaintiff's goods, it appeared that the defendant was an executor and distrained the plaintiff's goods *for rent-arrear due to his testator on a lease for years*,* and Lord Chief Justice *Lee* held the case to be within the statute; and the defendant had a verdict. Powell v. Killick. West. Mic. 25. Geo. 2. Bull. N. P. 57. *Q. If not "Who was lessee for years."

But it has been held, That the statute does not extend to rents out of copyholds. Yelv. 135.

3. The statute gives no new right of distress which the testator had not; therefore if the tenant had granted away or deprived himself of the right of distraining, the executor cannot do it. Co. Litt. 162. b

4. So under the words of the statute, the distress can only be made *on the tenant in whose hands the lands were chargeable, or some person claiming under him*; and therefore not in the hands of a person claiming by title paramount: as if the lands should *escheat*, a distress could not be made when in the hands of the lord. Ibid.

And therefore in an avowry by executors or administrators who have distrained for rent-arrear, they should properly aver "*that the land remains in the possession of the tenant who ought to have paid, or some person who claims under him*;" for to such cases only does the statute extend. Miles v. Willoughby. Cro. Eliz. 547.

But nevertheless a general averment in the avowry, that the lands were subject to the distress of the executor according to the form of the statute, was held to be good. Hool v. Bell. 1 Ld. Raym. 172.

5. If a person distrains as executor or administrator, he must bring himself within the statute: but where the avowry was *as administratrix* of rent, to which the defendant was *entitled in her right*, she nevertheless had judgment; that part respecting the claim as administratrix being rejected as surplusage. Brown v. Dunnery. Hob. 208.

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*And *note*, in general, That if the defendant avows for rent in arrear at *Michaelmas*, and at the time of the taking: the avowry is good though it does not say "*and which is yet unpaid*;" for the avowant avoids the injustice of the caption, if he shews that the rent was in arrear *at the time of taking the distress*; and no tender after could make the distress illegal. Bowles v. Poor. Cro. Jac. 283.

And so there may be judgment in replevin, though the party mis-recites his title, provided he shews a good and subsisting Pope v. Skinner. Hob. 72.

subsisting one. As where in this case, the party stated himself as entitled, under a lease made the 30th of *March*, and the jury found it the 25th of *March*; it was held to be good enough to give the party a title.

2. OF AVOWRY FOR DAMAGE FEASANT.

This taking of cattle or goods damage feasant, may be either for a trespass done, 1st, To one's own land; 2dly, To commons.

Co. Litt. 142. 1. In the case of distresses for damage feasant to *one's own land*, it is sufficient to observe, 1. That the distress for it may be made *in the night*, which in the cases of distress for rent

Id. 161. cannot be. 2. That the distress must be made *while the beasts are actually on the land*, for if they are driven off before they are seized, the person on whose land they were cannot follow and seize them. 3. Where the distress is for damage feasant, the party may tender amends till the cattle are impounded; but after that it is too late, and a tender to the

Pilkington's case. 5 Co. 76. bailiff is not good. *Vide Dovaston* v. *Payne*, *Post*. 374.

2. In the cases of distresses for damage feasant to commons, the question is of more extent.

Injuries to the commoner's right of common may be committed. 1st, By the *lord* putting in beasts not commonable, as hogs or goats; or by surcharging it: 2dly, By *another commoner* who is guilty of the same offences: 3dly, By a mere *stranger* putting his cattle on the common.

1. As to the Lord.

It is a general rule, that *a commoner cannot distrain the lord's cattle for surcharging the common*, except in the case where the lord has at the time *no right to put any cattle at all on the common*.

Trulock v. White. 1 Roll. Ab. 405. 506. *As where the custom was, that the land was to lie *entirely fresh* every second year till *Lady-day*, during which season the lord was totally excluded; *during that time he put cattle on*, and it was held, That the commoner might distrain them, he having then clearly no right to put on any cattle whatever.

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2. In the Case of another Commoner.

Dixon v. James. 2 Lutw. 1238. Wherever a commoner is entitled to common *for a certain number* of cattle, as ten or twenty, there if he surcharges the common, *another commoner may distrain the overplus*; for in such case the number being settled, the injury to the rights of others is evident.

But

But wherever the commoner's right of putting on cattle *is not ascertained in point of number* (as for example, if it depends on the number of acres which he holds) so that he has a colour to put in some cattle: in that case, though he may exceed the number, another commoner *cannot distrain* his cattle, but is driven to his writ of admeasurement of common: for as well in this case as that of the lord before, the commoner is not to judge for himself *where a wrong is not clearly committed*, but must recur to a competent and indifferent jurisdiction by writ of admeasurement, or he may have an action on the case for the surcharge of the common. *Post. Chap. of Trespass on the Case.* Hall v. Harding. 4 Burr. 2426.

In this case the commoner claimed a right of common for two sheep for every acre he held: so where the commoner claims common for cattle *levant* and *couchant*; in these cases another commoner cannot distrain, for the number depends on the land in possession of the commoner, and such cattle as are necessary to manure it. S. C. 4 Burr. 2431.

3. In the case of a Stranger.

The commoner *may distrain his cattle without danger*, for he has *no colour* of right.

In general, as to this avowry for damage feasant to common, it is to be observed,

1. "That it is different where it is for a number certain or "uncertain."

For if a man prescribes for a *certain number of cattle*, it is not necessary for him to say *that they were levant or couchant*; because it is no prejudice to the owner of the soil, the number being ascertained. Richards v. Squibb. 1 Ld. Raym. 726.

*But where the *number is uncertain*, as *levant* and *couchant*; for example, a prescription for all cattle *levant* and *couchant* will be good, and need not be for all his cattle; for levancy and couchancy are terms sufficiently ascertaining what cattle may be put in; for no more shall be said to be levant and couchant than the land is sufficient to maintain: and if the plaintiff was guilty of any fraud, as to that the defendant may take advantage of it by pleading. Harding v. Johnson, Mich 20 G. 2. Bull. N. P. 59. *[362]

2. "If a commoner justifies under a right of common, it "must be *by good and lawful prescription.*"

Therefore a prescription that every *inhabitant* of a vill should have common within such a place, is bad. Gateward's case. 6 Co. 60 b.

For such right would be transitory and uncertain, for it would follow the person, and for no certain time or estate: but custom ought to have certainty and continuance. Agnes Fowler v. Dale. Cro. Eliz. 263.

So,

English v. Burnell. 2 Wils. 258.

So on account of the same weakness of estate, a prescription claimed by the defendant, as *occupier of certain messuages* to a right of common was adjudged to be ill.

3. "Wherever a commoner relies on a prescriptive right "to common, he should set out *the whole of the prescription* "as in fact it is."

Lovelace v. Reynolds. Cro. Eliz. 546.

For where the defendant prescribed generally to have common in the *locus in quo*, and the jury found that he was entitled to common by prescription, *prout*, &c. *paying for it* 1d. *yearly to the plaintiff*; it was on the verdict adjudged for the plaintiff; for the *paying* was part of the prescription, a condition precedent, and should have been set out in pleading the prescription.

"But where any *collateral matter is connected with the pre-* "*scription*, but makes no part of it, it need not be set out."

Gray's case. 5 Co. 78. Cro. Eliz. 405. S. C.

As where a copyholder prescribed to have common, and the jury found that he was entitled to the common, *but that it had been the custom to pay yearly for the same an hen and five eggs* to the lord, it was held that the prescription was well pleaded, for the payment of the hen and eggs made no part of the prescription, but was a collateral demand, or rather a prescription in the lord's favor for so much.

Waring v. Griffiths. 1 Burr. 440.

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So where the plaintiff set out a prescriptive right to bury in the chancel of the church of *Oswestry*, and this was found to be so; but further, *that two shillings had been used to be paid to the church for every person so buried*, it was held, That the prescription was well pleaded, for the payment was collateral and no part of the prescription.

4. "Under a prescription for common, the commoner "must prove the *whole* of the prescription as he has laid it."

Pring v. Henley. Per Ward, C. B. at Exeter, 1709. Bull. N. P. 59.

As if he prescribes in his avowry to have common for *all commonable cattle*, and upon issue joined thereon he gives in evidence "common for *sheep and horses only*," it will not maintain his issue; for a prescription is an entire thing: but if *he had a general common*, i. e. *for all kinds of cattle*, and prescribe for common *for any particular sort*, it had been good, for it is within the general prescription.

Mitchell v. Mortimer. Hob. 209.

So where a commoner prescribed for common for all the beasts levant and couchant upon a messuage, *two hundred acres of land, fifty* acres of meadow, and *fifty* of pasture *in four towns*, and the jury found that he had common as belonging to two hundred acres of land, twenty of pasture and meadow *in two towns* only, and not in the other; judgment was given against him, as having failed in his prescription; for the prescription *claimed* was more extensive than that proved.

"But

"But where the *nature* of the prescription is found as "laid, but variant only in *the quantity of land to which it ex-* "*tends*, the prescription shall be held to be well laid, for it "is the same prescription."

As where one prescribed to have common to his messuage, and *twenty acres* of land, and it appeared on evidence that he had but *eighteen acres*, it was held to support the prescription as laid. But if he had ten acres of copyhold and ten of freehold, he had failed in his prescription, for he could not make a prescription for both; so if it appeared on the evidence that part of the land was copyhold an hundred years ago, though then it was freehold, there too he had failed. For as the prescription must be beyond the time of legal memory, it must have been different then from what it was at first, and so there could be no prescription as was laid. Gregory v. Hill. Cro. Eliz. 531.

"And so if the nature of the prescription remains the "same, but it is found to be *more ample* than was laid, it "shall be good."

As where the prescription was, to tether horses *from* and *after the feast of the Pentecost yearly*, and the verdict found that they had used to do it on the day before the *Pentecost*, on the day itself, and the *Monday* in the week of the *Pentecost*, and afterwards during the year at pleasure: this finding being more large than the prescription as laid, was adjudged well to support it. Johnson v. Thoroughgood. Hob. 64. [364]

5. Wherever a copyholder prescribes *against a stranger*, he must prescribe through the lord: but where he prescribes against *the lord himself*, he must allege the prescription *by way of usage*. Pearce v. Bacon. Cro. Eliz. 390.

That is, *as against a stranger*, he must say, "That the lord of the manor and all his ancestors, and all those whose estate he has, have had common in such a place for him, and his tenants at will," &c., and that shall be good for the copyholder: but *as against the lord*, he must say, "That within the manor there is such a custom," &c. Anon. Copyhold case, 25. 4 Co. 316. Id. 31. b.

3. OF AVOWRY FOR FINES AND AMERCEMENTS IN COURTS LEET OR BARON.

1. For offences which are within the conusance of the steward of a court-leet, and *of which he hath a view*, he may assess a fine, as for a contempt or disturbance in court: but for offences not within his view, he can assess no fine *without a presentment*, for *non constat*, whether the party was resident within the leet or not, or what cause he had for his absence. And therefore, where the steward assessed a fine *for not coming into court to do suit*, for which the distress was made, it was held to be ill; but it seems he might be amerced: for if the fine is too grievous, the party would be without remedy: but Hall v. Turbett. Cro. Eliz. 241. Griesley's case. 8 Co. 3. Res. 386.

11 Co. 45. a. but for an amercement a *moderata misericordia* lieth, 10 *H.* 6. *c.* 7. And *note*, That for a fine as well as an amercement, a distress of common right belongs.

But for a fine in a court-baron, the lord cannot distrain without a prescription.

Wood v. Lovatt. 6. T. Rep. 511. But the amercement cannot be *for a private injury done to the lord*, even though warranted by custom.

Stephens v. Haughton. 2 Stra. 847. 2. In the avowry for taking by reason of an amercement for any offence, the avowry should state "that the plaintiff "*was guilty.*"

Perham v. Norton. Cro. Eliz. 885. For herein replevin differs from trespass: That in replevin the defendant makes a title, and is to recover; which can only be by shewing a title under the forfeiture: but in trespass for taking the goods, the defendant is only to excuse the wrong.

Matthews v. Carew. Salk. 107. Therefore in *trespass*, it is sufficient to say, that the offence *was presented* for *non refert* as to the defendant in such case, whether the offence was committed or not: but in replevin the offence should be set out with an averment that the party was guilty of the offence for which the amercement was made.

Brook v. Hustler. Salk. 56. *[365] 3. In the case of a *court leet*, the amercement should be general by the steward, *viz. quod sit in misericordia*, and then the amount of the amercement is to be ascertained by the affeerors.

Rowleston v. Alman. Cro. Eliz. 748. In the case of a *court-baron*, the steward may in the like manner amerce.

Stephens v. Haughton. 2 Stra 847. For if the *amercement* was *by the jury*, it would be bad; they can only affeer the amount.

Baldwin v. Pudge. 2 Wils. 20. And the amercement can only be affeered by the *freeholders of the manor.*

And these matters now mentioned should always be set out in the avowry, as necessary to give a title to a return.

4. "And in every case the defendant is called upon to "shew a good and complete title."

Wormleighton v. Burton. Cro. Eliz. 443. As, 1st, The avowry should state. "That the place "where the offence was committed was within the manor "or jurisdiction of the court, from which the amercement "issued."

Ibid. C. 2. That the *crime was cognisable* in that court.

Hill v. Towers. Cro. Eliz. 791. 3. That the goods taken were the property of the person who made default, and was amerced: for where the goods of his under-tenant were taken, it was held to be bad under the prescription.

4 By

4. By *common right* every manor has a court-baron annexed to it, and therefore, where it was claimed *by prescription* it was held to be bad, for prescription shall not be where a thing is by common right. S. C.

5. "The avowry should also shew "*that the manor was* "*in the hands of the defendant avowing, or of his principal,* "*where there is conusance made.*"

For where the defendant made conusance, as bailiff to the dean and canons of *Windsor*, as of their manor of *Hampton-Court*, for an amercement for not doing suit of court; but it appearing that the dean and canons *had let the manor* at the time of the avowry, though they had reserved to themselves the profits of the manor and courts incident to it, the plaintiff had judgment; for the court is incident to the manor, and cannot by any exception or reservation, be severed from it. Brown v. Goldsmith, Hob. 108.

And lastly, In avowing for a fine in a leet, the avowry need never conclude *prout patet per recordum.* Per Holt. 1 Lord Raym. 117.

4. OF AVOWRY FOR TOLLS AND CUSTOMS. [366]

Under this head I shall consider tolls, 1st, With reference to Ways: 2dly, To Fairs and Markets: 3dly, To Ports or Quays.

1. Of Tolls with reference to Ways.

Toll considered with reference to *ways*, is either toll thorough or toll traverse. Moor, 546. 2 Wils. 299.

Toll thorough is a toll paid for passing over the *king's highway*; and this being against common right, *cannot be claimed or taken without good consideration*; as *ex. gr.* repairing the streets or ways, for the passage over which it is claimed.

So that on the ground of prescription alone it cannot be supported.

Toll traverse is a toll paid for liberty to go across the lands of another person; and this may be claimed by prescription, *without any consideration appearing*, and payment of it from time immemorial shall be sufficient; but it can only be claimed from its nature *by the lord of the soil*, as being in its nature a compensation for the use of the soil. Ibid. Fitzherbert Abr. pl. 8.

1. "In claiming of toll *thorough*, the party *must shew every* "*circumstance entitling himself*, or the court will lean against "him, for the jealousy they entertain of thus levying money "upon the subject; that is; *he must shew a good consideration,* "*and that he is within the prescription under which he claims.*"

Trueman v. Walgham. 2 Wils. 296.

For where the defendant prescribed to have *toll thorough* from every cart or waggon coming from any other manor, and passing into the town of *Gainsborough*, on the consideration of repairing, cleansing, and maintaining *divers and many streets* belonging to the said town; and for non-payment distrained, and had a verdict; but judgment was afterward arrested: for as he could only claim toll on the ground of repairs, his right therefore must be confined to the streets repaired, and as he had laid his prescription for repairing *divers and many* of the streets of *Gainsborough*, it did not appear that the waggon on which the present distress was made was going over the streets repaired, and therefore the defendant might have no title.

"And therefore the party prescribing for toll thorough, is "always tied down to great strictness in pleading."

Smith v. Shepherd. Cro. Eliz. 710. *[367]

* As where the defendant prescribed to have a toll, of two pence for every twenty sheep driven through the manor of *Melton Mowbray* by any foreigner, and if not paid, a right to *distrain* for the same, and then justified, that the plaintiff having refused to pay the toll, that he *cepit et abduxit* one sheep, and distrained it till the toll was paid. This justification was held to be ill; for the prescription was to *distrain*, and the defendant had not pleaded the taking *as a distress*, but only that he *cepit et abduxit*, which was not within the prescription.

2. Of Toll in Fairs and Markets.

2 Inst. 220.

1. The establishment of public fairs and markets is a branch of the royal authority, and the king may by his grant erect new ones, and bestow a certain toll on the person to whom such fair or market is granted. But the *toll must be some petty sum*; for if the king grants a fair or market with excessive toll, it is void, and the market becomes free.

Id.

So fairs and markets, and the toll incident to them, may be claimed by *prescription*, which supposes a grant.

Heddy v. Wheelhouse. 4 Cro. Eliz. 558. 591.

But the grant of a fair or market, *cum omnibus libertatibus et pertinentiis*, toll does not pass; for it is not due of common right, but must be given by express words in grant. This is the case of a grant of a new fair; but if there has been an ancient fair, to which by prescription toll has been annexed, and it becomes forfeited to the King, and he grants it to another, *cum omnibus libertatibus illi spectantibus*, by this the toll shall pass; for this is not a new grant, but a grant of an ancient fair, to which the toll belonged.

Holloway v. Smith. 2 Stra. 1171.

But where a fair was held by custom *on a particular day*, to which toll was due, and afterward the king, reciting this grant, granted to the same place two fairs, *on different days* from

from the former, *with all the profits, commodities, emoluments, liberties, and free customs ad hujusmodi ferias pertinentiis*: this was adjudged on demurrer, not to carry with it a right of toll, as not being expressly given; and the fair not continuing the same, the custom could not extend to it.

2. "This claim of toll being an exaction on the subject, is "to be taken strictly according to the grant or custom, and "therefore shall be confined to cases only falling completely "within it."

Therefore where, in trespass for taking the plaintiff's wheat, the defendant justified the taking as a distress, as entitled by prescription to a toll for *all corn brought into the market of* Ripon *for sale*, it appeared in evidence, That the corn had been sold by sample *at the plaintiff's house*, to be delivered within the month by one *Cowper*, who lived ten miles out of the town; and that it was *only carried through* the borough on a market-day in a waggon to the plaintiff's house, and delivered, but was *never exposed in the market*. On this evidence, the taking was adjudged to be unlawful, as not being within the prescription; and though it might be *a fraud* on the market, yet that could not in this action be remedied, but should be sued for by an action on the case. Blakey v. Dimsdale. Cowp. 661. [368]

And *note*, 1. That tenants by *ancient demesne* are excused and discharged from the payment of all tolls, by reason of their tenure; but this is for the toll due in carrying the *produce of their lands*, not for merchandize. Ward v. Knight. Cro. Eliz. 277.

2. That though goods brought to public market may be distrained for *toll*, yet they cannot for *damage feasant*; for every one is of common right entitled to bring his goods and expose them to sale in a public fair or market. Mayor of Launceston's case. Cro. Eliz. 75. Id. 627. S. P.

3. Of Tolls due for landing Goods at Ports or Quays.

1. Every common river is as an high street, and therefore subject to the same law, as to toll, as was before mentioned in the case of highways. Salk. 249. 2 Brownl. 181.

And therefore, where the city of *Norwich* claimed a toll on all goods passing on the river, by such a quay or wharf, *but without shewing any consideration*, as cleansing the river or repairing the banks, *&c.*; on demurrer, judgment was given against them. Heshford v. Wills. 1 Sid. 454.

But where in trover for an anchor and sails it was found by a special verdict, That the mayor and burgesses of *Newcastle*, by custom time out of mind, used and ought to repair the port, and *in consideration of that* were entitled to a toll of five shillings per chaldron on all coals exported, with a power of distress, and that the anchor and sails were for non-payment thereof distrained: it was resolved, 1st, That it was Vinkeston v. Ebden. Salk. 248.

was not necessary for the mayor, &c. to shew *that he actually did keep the port in repair*, it was sufficient that they were *liable*, as that was the consideration: 2dly, That the *master* was liable to have the things taken, as he was the exporter as to that: 3dly, That the anchor and sails, though the instruments of trade, were destrainable.

Mayor of Exeter v. Trimlett. quot. 3 Burr. 1405. Mayor &c. of London v. Hunt. 3 Lev. 37. S. P.

*2. So the landing of goods at any port or quay is *of itself* a consideration as a benefit to the public, and a toll for it may be claimed by prescription only, as in the nature of toll *traverse, without setting out any consideration*, the ownership of the soil being sufficient, as, like toll traverse, it is in the nature of a compensation for the use of the soil.

*[369] Colton v. Smith. Cowp. 47.

So, in an action for toll of a wharf at *Gainsborough*, the plaintiff claimed, *as lord of the manor*, a toll by prescription for all goods *landed within the manor*: and having set out a consideration, *viz.* the keeping a wharf within the manor in repair, though he claimed toll for goods landed at any part of the manor, it was insisted, That as he grounded the claim of toll on the consideration of repairing the wharf, that as that would confine the toll only to goods landed at the wharf, that he had failed in his prescription. But he had judgment notwithstanding; for his claim was in the nature of toll traverse, in which no consideration was necessary to be stated by the party claiming. For if the goods were landed on the manor, they had the benefit of plaintiff's private property, and if at the wharf the benefit of it.

Mayor of Yarmouth v. Eaton. 2 Burr. 1402.

But this toll at ports or quays differs from toll traverse in this respect, that it is not necessary that the parties claiming it should *be owners of the soil*, which would be *of itself* a sufficient title, as in the last case: for even if that does not appear, yet it may be good; *for the crown has a right to create the duty, and may grant it to another, though it retains the port*, and so if no grant from the crown appears, it may be claimed by prescription, so that *grant* or *prescription* may give a title.

Mayor of Kingston upon Hull v. Horner. Cowp. 102.

As where the *corporation of Kingston upon Hull* claimed a certain toll, called water bailiff's dues, *by prescription*; and in evidence it appeared, that their charter was in 27th *Ed.* 3. and so full a century within the time of legal memory, (time of *Richard* 1.) and therefore it was insisted, 1st, That the corporation could not prescribe; and, 2dly, That by a subsequent charter in 5 *Rich.* 2. the port was created, and that therein no duties were granted to the corporation. But as it appeared that these duties had been paid for 350 years, and that the grant of the port was in these words, "*portum dudum vocat.* Sayrecreek *jam* Hull:" on these circumstances the Court were of opinion, that it was matter of presumption to be left to the jury, whether the word *dudum* did not implyan existing port before the making of the charter of *Rich.* 2? and whether the payment of the duty

duty for 350 years, viz. from 1441 to 1764, (the time of the action,) would not be sufficient to support the presumption of a grant from the crown of those duties, between the times of 5 *Rich.* 2. (*ann.* 1382) when the charter creating the port was granted, and 1441, when the first payment was proved? On this ground, a verdict was found in favour of the corporation's right to toll. [370]

3. "As, therefore, toll may be claimed at ports or quays "in the nature of toll thorough, on the ground of the benefit "derived to the subject from the use of the port or quay, and "its being kept in repair by those claiming the toll: where "that benefit is not enjoyed no toll is payable; that is, use of "the port is necessary to give a claim to toll."

For where the defendant avowed for toll as due from all ships unlading at the quay, on the ground of repairing the port: in evidence it appeared, *that the quay extended but half a mile*, and *that the ship in question had unloaded seven miles from the quay*, the prescription was adjudged not to extend beyond the quay, and that the plaintiff was not liable to the payment of toll, he not having used the quay. Prideaux v. Sir T. Raym. 232. 2 Lev. 96.

So where a custom was alleged in the city of *Norwich*, that in regard that they maintained a common quay for the unloading of goods brought up in the river in vessels to the said city, that every vessel passing *through the said river by the said quay* should pay a certain sum. This was held to be a void custom; for it *should not extend to those vessels which never unladed at the port*, and so derived no benefit from it. Hasperty v. Wills. 1 Vent. 71.

4. "In prescribing for a toll or customary payments, it "should be for a *sum certain and defined.*"

But a prescription to have three bushels out of every cargo of barley brought to the quay of *Penzance* was held good, though the cargoes might be of different magnitudes; for the word *cargo* is a mercantile word, and sufficiently certain and determinate. Sergeant v. Read. 1 Wils. 91. 2 Stra. 1228. S. C.

5. If a person justifies the seising of any goods, &c. he should state the particular cause of seisure; as for toll, forfeiture, or custom; and 2dly, it seems that he ought to say that it had been usual to seize; for it is no custom or prescription if not put in use. Clearywalk v. Constable. Cro. Eliz. 118.

5. OF AVOWRY FOR SUITS AND SERVICES, OR OTHER THINGS CLAIMED BY CUSTOMS OF A MANOR.

As, first, For an *heriot*:

If the defendant avows the taking for *an heriot* generally, it is bad; it should be for the *best beast* or so, that so the plaintiff Show v. Taylor. Hutt. 4. Mch. 176. S. C.

plaintiff might have his replication that the deceased had no beast: and besides, the heriot might be of a thing different from that taken as it may be a *jewel* or a *piece of plate*, as well as the best beast or living thing.

Odiham v. Smith. Cro. Eliz. 589. Major v. Brandwood. Cro. Car. 260.

And where the lord is entitled to *heriot service* he may distrain generally, or seize any beast of the tenant: for it is at his election to take what beast he deems the best; but for *heriot custom* he must take the beast itself, not *another as a distress for it*; for it lies in prender and not in render.

3. "Wherever a distress is made for any sum claimed as "due by custom, it must be a reasonable one; for if unreasonable, it is void."

Holland v. Lancaster, 2 Vent. 134.

As where the defendant made conusance as bailiff to the dean and chapter of *Canterbury*, to whom the plaintiff was lessee, and claimed, that, by the custom of the manor, the lessee on alienation was to pay a fine of a year and a half's rent, and if not paid, a distress. On demurrer, the plaintiff had judgment; for the custom was unreasonable, as so upon every alienation of even the smallest part, the same fine would be due.

Parker v. Copbleford. Cro. Eliz. 725.

So where the lord claimed by custom the best beast *of every stranger* dying within the manor as an heriot. On demurrer, the custom was adjudged to be ill; for it cannot be supposed to have a reasonable or lawful beginning, as is the case between the lord and his tenants, who may be supposed to have made the agreement when their tenures began, as a species of consideration; but no such consideration or agreement can be supposed to subsist in the case of a stranger.

3. "Wherever the defendant, in his avowry, relies on a "custom to take a distress for suit or services, he should set "out *the whole of it*."

Griffin v. Blandford. Cowp. 62.

For where the defendant avowed under a custom that the lord of the manor was entitled on the death or alienation of every tenant, to the second-best beast, and if but one, then to that beast; and if no beast, then to a compensation in lieu of it. Upon evidence, the custom appeared to be as stated, *but with an exception* of mesne signories, burgage-tenures, and alienations to the use of the alienees and their heirs: and the avowry was for that omission held to be ill.

Richard Godfrer's case. 11 Co. 42.

4. The defendant in this case avowed the taking of two cows, for cause that he was seised of the manor of *Bethel* in *Norfolk*, and that from time immemorial he and those, &c. had been intitled to a leet within the said manor, and that the steward had used to swear twelve of the inhabitants as chief pledges, to present all things within the leet, and that they had been used to present, that they should pay themselves to the lord ten shillings *pro certo leeta*: That the plaintiff

tiff and others, being sworn chief pledges, had refused to present such sum of ten shillings to be paid as aforesaid, wherefore the steward had then fined them in six pounds, and avowed the taking for the non-presenting or paying of the several sums of ten shillings and six pounds: to which avowry the plaintiff demurred; when it was resolved, 1st, That the fine was unlawfully imposed; for it was imposed jointly, but it ought to have been assessed severally, for the offences are distinct: one might, after payment of his part, lie in jail till the whole was paid, which would be unjust; and such matter being shewn by plea, should avoid the fine. 2dly, That for this certainty of leet, the lord could not distrain of common right; for it is for the private advantage of the lord, and he therefore could not have it *without prescription*, which he therefore should shew.

2. OF CASES IN WHICH NO REPLEVIN CAN BE MADE AND SO NO AVOWRY.

1. "*Goods taken beyond sea*; that is, in foreign countries, "though afterwards brought into *England*, cannot be re- "plevied.

As where goods were seized by the *East India* Company from interlopers on their trade in *India*, within their charter, it was held that no replevin lay for them: for the caption might there have been lawful, though not so with us; and therefore should not be tried by our laws. — Nightingale v. Adams. 2 Show. 91.

2. Replevin does not lie for the *charters relating to the lands of inheritance*; for they belong to the heir, and therefore are not chattels, and so not replevisable. — Broke, tit. Repl. Pl. 34.

3. *Goods seized in consequence of any judgment or adjudication* of courts, or persons having jurisdiction are not replevisable.

As if taken under an *execution from the superior courts*, they cannot be replevied; and if attempted to be so, the Court will commit the offender for a contempt. — Win v. Forster, Lutw. 1191.

So where a person's goods were seized under a *condemnation in the penalty of* 20l. *before a justice of peace*, for not entering strong waters, and he replevied them, the justice's warrant was held to be a sufficient justification, and to support the seizure, which therefore could not be replevied. — Aylesbury v. Harvey. 3 Lev. 204.

And where goods had been so seized under a *conviction* for deer-stealing, the Court granted an attachment against the under sheriff who had granted a replevin for them. — Rex v. Monkhouse. 2 Strs. 1184.

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4. So a replevin does not lie against *the king*, nor where the king is party, nor where the taking is in right of the king — Year book. 19 H. 7. 1.

king; for all the king's debts are of record, so that the taking for them is as for a judgment.

Ante. 2 Roll. Ab. 430.

5. In general, replevin will not lie without a property in the goods, taken either absolute or special; and therefore animals *feræ naturæ*, unless reclaimed, cannot be replevied.

3. The third process in pleading in this action, is the

REPLICATION.

or plea to the avowry.

Co. Litt. 268.

1. *Disclaimer* was formerly an usual replication, in which the plaintiff disavowed the holding of the land from the defendant; but this is now unusual; for in that case the avowry must have been on a *certain tenant*, which now not being usual since the stat. *Hen.* 8, allowing an avowry generally on the land, the replication of disclaimer now seldom occurs.

Trevilian v. Pyne. Salk. 107.

2. If the defendant makes conusance as bailiff to *J. S.* the plaintiff may traverse the fact that he was bailiff: for though *J. S.*, may have a title, yet a stranger who had no authority from him, could have no title, and would be liable; so that both parts of the defendant's plea must be true, and therefore an answer to any part is sufficient.

8 Co. 147. a.

3. If the defendant justifies the taking, the plaintiff may reply *a tender*, and have judgment: for if a tender was made upon the land before the taking, the distress is unlawful; and if made after the taking and before the impounding, the detaining is unlawful.

But a tender to a servant is not sufficient.

Cro. Eliz. 813. Co. Litt. 145. Buller, N. P. 60.

And if the defendant avows for rent, the plaintiff may plead a tender and refusal, without bringing the money into court; because if the distress was not rightfully taken, the defendant must answer in damages.

4. "If the defendant justifies under a custom, the plaintiff *cannot reply another custom repugnant to it, without traversing that set out by the defendant*, but the plaintiff may reply some qualification of the custom set out by the defendant, which admits the custom of *sub modo*, without any traverse."

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Kenchin v. Knight. 1 Wils. 253.

As where to trespass, *quare clausum fregit*, the defendant pleaded a custom, that all the tenants and occupiers of certain ancient messuages had a right of common, and under such custom justified the putting in of swine. The plaintiff replied, and confessed the custom as pleaded to be true: but added, that the custom went further: to wit, *that the swine should*

should be rung, to prevent them from rooting up the soil. This replication was held to be good without a traverse; for the customs were not different, but that stated by the plaintiff was a qualification only of the custom set out by the defendant.

5. If the defendant avows the taking for rent-arrear, it is a bad replication to say, "that the defendant had made a distress *and avowed for rent due at a day later than that for which he then avows*;" for that is no bar. Palmer v. Stannage. 1 Lev. 4.

6. "To an avowry on a distress for rent-arrear, in case "of an under-lease, it is a good replication" *that the defendant paid the ground-rent to the original landlord.*

For where the avowry was for 50*l.* for rent due at *Christmas*, for the plaintiff's house; the plaintiff replied as to 20*l.*, part of the 50*l.*, that the defendant held the house in question as tenant to the *Duke of Portland*, at a certain ground-rent which was 20*l.* in arrear, and not paid by the defendant; that this sum being demanded of the plaintiff, and he being threatened to be distrained for the same, had paid it, and that therefore, as to that 20*l.*, nothing was in arrear: To this there was a general demurrer, and the plaintiff had judgment, the court being of opinion, That an under-tenant had a right so to pay the ground rent for his own security. Sapsford v. Fletcher. 4 Term Rep. 511.

7. In bar to an avowry for *damage-feasant*, the plaintiff pleaded, "That the cattle *being* in the highway, had escaped from such public highway into the *locus in quo*, through the defect of the defendant's fences." This was, on demurrer, adjudged to be ill for not averring that the cattle were *passing along* or *on the said highway* when they escaped.—For as the plaintiff had set up the defect of the fences of the defendant as an excuse for his cattle having escaped and committed the trespass; he should have shewn that he was lawfully using the easement when the cattle so escaped. Dovaston v. Payne. 2 H. Black. 527.

2. REPLEVIN CONSIDERED WITH REFERENCE TO THE PERSON.

1. If the goods of several persons are taken *they cannot join in the replevin*, but each must have a several replevin. For if the caption is unjust, each has a separate injury, for which he ought singly to complain: but if they joined, each would be complaining of the injury done to the other, which would be absurd. Co. Litt. 145.

Therefore *tenants in common* should not join, but have several avowries. Willis v. Fletcher. Cro. Eliz. 330.

So one tenant in common cannot avow *alone* for taking cattle damage-feasant; but he ought to make conusance as bailiff to his companion. Culley v. Spearman. 2 H. Black. 381.

Which decision is founded on the rule, *Co. Litt.* 198. a, that tenants in common must all join in actions which concern that pesonalty.

Stedman v. Bates. Salk. 390.

But *coparceners* should join in an avowry, for they make but one heir.

2 Lut. 1211. *[375]

* So also should joint-tenants.

F. N. B. 169. Bourne et ux. v. Mattaire. Pasch. 8. G. 2. Bull. N. P. 53.

2. If the cattle of a *feme sole* be taken, and she afterwards intermarries, *the husband alone* may have replevin; for by the marriage all the personal property of the wife becomes absolutely his. But if the wife joins in the replevin, after a verdict, judgment will not be arrested: for the court will presume them to be jointly interested, (as they must be if a distress is taken of goods, of which a man and woman were joint-tenants, who afterwards marry,) the avowry admitting the property to be in the manner it is laid.

Wise v. Bellent. Cro. Jac. 442.

So where *rent* is due to the *husband and wife*, yet may the husband alone make avowry, but he must set out the truth of the case, that the rent was due to him and his wife, and aver her life, and so that the rent is due to him.

Arundell v. Trevil. 1 Sid. 81.

3. *Executors* may maintain replevin for the goods of the testator, though taken in his lifetime; for as the testator's property is transferred to the executor, the right must be also transferred of recovering possession of it.

2 Roll. Abr. 431.

If *A.* takes my goods by command of *B.*, I may have replevin against both, for it being a trespass, both are principals.

3. OF THE JUDGMENT, COSTS, AND DAMAGES.

R. "If the defendant in replevin has judgment, it is for "a return of the beasts which had been taken by him, and "restored to the plaintiff."

Sir Henry Snelgar v. Henston. Cro. Jac. 611.

But he can have a return of no more beasts than he avows for.

And, 2. by statute 21 *Hen.* 8. *c.* 19. "Every avowant "and other person that makes avowry or conusance, or justifies as bailiff in replevin, or second deliverance for rents, "customs, or services, and damage-*feasant*, if *the plaintiff* "*be barred*, shall recover damages and costs."

Haselop v. Chaplin. Cro. Eliz. 257. & 329.

Though in this statute only rents, customs, services, and damage-*feasant* are mentioned, yet it shall extend to give to the avowant costs and damages in other cases not there mentioned; as in avowry for *amercements in leete, heriots, estrays*, &c. if the plaintiff is barred.

But

But where the avowry was for an *amercement in a leet*, and the plaintiff was *nonsuited*, upon which the defendant had a return, the Court were of opinion, That he could not have his costs and damages, as not being within the statute. Porter v. Gray. Cro. Eliz. 300. [376]

But *quære*, If there is not a difference in case of trial, and verdict, and a nonsuit, otherwise these two cases contradict each other.

In this case, the judgment in replevin was, "That the "defendants have return of the cattle, that they recover their "damages and costs, (which they had before assessed) "damages, costs, *&c.* amount together to 65*l.* :" on a writ of error it was assigned, That this was bad as a common law-judgment, because it did not adjudge a return of the cattle *irreplevisable* : and bad, as under stat. 17 *Car.* 2., there being no value found : but it was resolved, that this was good either as a *common law judgment*, without saying that the return should be *irreplevisable*, for that since the stat. *West.* 2. (*Post.* 379.) the return was irreplevisable, or that it was good as a judgment, under stat. 21 *Hen.* 8. 19. ; under which the defendant is entitled to judgment for his costs and damages. Gamon v. Jones. 4 Term Rep. 509.

Neither does it extend to give costs and damages in an avowry for a *nomine pœnæ*, for it is not mentioned in the statute : and therefore if costs and damages should in these cases be given, the judgment should be reversed. Jones, 235.

3. By statute 17 *Car.* 2. *c.* 7. it is enacted, "That where-"ever the plaintiff in replevin should be nonsuited *before issue "joined* in any court at *Westminster*, that the defendant ma-"king a suggestion in the nature of an avowry to ascertain "to the court the cause of the distress, the court shall award "a writ of inquiry to the sheriff of the county where the dis-"tress was taken, and the sheriff having given fifteen days "notice to the plaintiff or his attorney, shall execute such "writ of inquiry by a jury of twelve men, and the defendant "shall have execution for the sum found, by *fieri facias*, or "by *elegit*, in case the goods taken amount not to it, and the "costs of suit.

Under this statute it has been resolved,

1. That if the plaintiff becomes nonsuit, that the defendant is not bound to take his remedy under the statute : for he may have his option either to proceed by writ of inquiry under it, or *bring his action against the plaintiff and his sureties on the replevin-bond.* Waterman v. Yea. 2 Wils. 41.

2. But if the defendant does proceed under the statute, by suing out a writ of inquiry, and also a *retorno habendo*, a writ of second-deliverance shall be supersedeas to the writ of *retorno habendo*, but not to the writ of inquiry ; so that the Cooper v. Sherbrook. 2 Wils. 116. Anon. Latch. 72.

the plaintiff shall have his cattle, and the defendant his arrears, costs, and damages, by virtue of the proceedings under the statute.

Pratt v. Rutledge, Salk. 95. Baker v. Lade, 2 Carth. 253.

For the damages are not for the things avowed for, but given by statute 21 *Hen.* 8. *c.* 19. as a compensation for the expense and trouble the avowant has undergone; and therefore though the writ of second deliverance supercedes the effect of the defendant's judgment or nonsuit, *viz.* a return of the goods, yet the damages still continue. *Sed quære*, If under the writ of inquiry the defendant shall not recover all the rent avowed for, besides his costs and damages? For, per Justice *Bathurst*, in *Cooper* v. *Sherbrook*, *ante*, by 17 *Car.* 2., The legislature intended that the proceedings under the statute by writ of inquiry, *fieri facias*, and *elegit*, should be final for the avowant to recover his damages, and that the plaintiff was to keep his cattle, notwithstanding the course of awarding a *retorno habendo*, which is a right judgment (and still is entered up as before the statute;) for the statute hath not altered the judgment at common law, but only gives a further remedy to the avowant.

2 Wils. 117.

Bull. N. P. 58.

4. By the same statute, 17 *Car.* 2. *c.* 7., it is further enacted, "That if the plaintiff be nonsuited *after avowry*, or "have a verdict against him, that the jury that try the issue "shall enquire of the sum in arrear, and also of the value of "the goods, &c. taken, and the defendant shall have judg-"ment by *fieri facias* and *elegit*, as before.

"And if upon demurrer the defendant has judgment, a "writ of enquiry shall go in like manner."

Cheap v. Cul. pepper. 1 Lev. 255. 1 Vent. 40. S. C.

Under this statute it has been resolved, that if the plaintiff is nonsuited after the avowry, *the jury only who try the cause can assess the arrears, damages*, &c.; and that if they omit it, it cannot be supplied by a writ of inquiry, for the statute expressly confines the inquiry of the rent in arrear, damages &c. *to the jury impannelled to try the cause.*

Tucker v. Stephens, Pasch. 6. Geo. 1 C. B. Bull. N. P.

And therefore, in case of such omission, the defendant must take his judgment, *de retarno habendo*, at common law.

"So the jury must find under this statute, *as well the* "*amount of the rent arrear as of the value of the goods dis-*"*trained.*"

Rees v. Morgan. 3 Term Rep. 345.

For where the avowry was for 195*l.*, three years rent in arrear, and the jury found a verdict to that amount, as damages to the amount of the rent, but did not find either the amount of the rent or the value of the things distrained; this was held to be error, but *the Court allowed the judgment to be amended to a judgment* pro retorno habendo, after a writ of error brought.

"But

"But this is confined to cases within the statute; as in "avowries for *rents*."

For in this case where the defendant avowed the taking as a distress for *poor's rates*, and the jury omitted to enquire of the damages, the Court granted a writ of enquiry to supply the defect. Dewell v. Marshall. 3 Wils. 442. Herbert v. Waters. Salk. 205. S. P.

And in general, in the case of *Valentine* v. *Faucet*, 2. *Stra.* 1021, and *Cas. temp. Hardwicke*, 138., Lord *Hardwicke* laid it down, That in every case, unless where the Court is tied up by stat. 17 *Car.* 2., which respects only rent-arrear, a writ of enquiry may be granted, in order to do complete justice. Per Gould, Just. 2 Blackst. Rep. 921.

Therefore it was so held in the case of poor's rates.

So where the defendant avowed for a taking for *damage feasant*, and the plaintiff was nonsuited, it was held that a writ of inquiry should be granted. Humfreys v. Misdale. Comb. 11.

And note, That in writs of inquiry the jury set their hands and seals to their verdict, and upon the trial of such writs, the judge of *Nisi Prius* is only assistant to the sheriff, and has no judicial power, and if the parties come to any agreement at the trial, the way is to bring it to the judge to sign, and afterwards move to have it made a rule of court. Per Cur. Cas. K. B. 519. 610.

"The cases of nonsuit after avowry, mentioned in the stat- "ute, apply only to cases of *nonsuit at the trial*."

For as in replevin both the plaintiff and defendant are actors, either may carry down the cause to trial; and therefore *the defendant cannot move to have judgment as in case of a nonsuit for not proceeding to trial*; for he might have given notice himself; in which case, if he had not gone on to trial, he would have had costs against him; but if the plaintiff had given notice of trial, it seems that he should pay costs. Eggleton v. Smart. 2 Black. Rep. 875. Jones v. Concannen. 3 Term Rep. 661.

5. Where there are several defendants, and one of them pleads *non cepit*, and is acquitted, in which case, under stat. 8 & 9 *W.* 3. *c.* 11. *in actions of trespass*, he would be entitled to his costs against the plaintiff, if there was no certificate from the judge, "that there was good ground for making him a defendant," yet in the case of *replevin* the defendant acquitted cannot have his costs, for replevin is not within the statute; for it is not mentioned; and statutes giving costs are to be construed strictly. Ingle v. Wordsworth. 3 Burr. 1284.

Before I conclude this chapter, it may be proper to take notice of some points which occur in this action.

*1. Where the goods distrained have been eloigned, so that the sheriff cannot get at them to make replevin, in such case, the Bull. N. P. 52. *[379]

the plaintiff may bring this action in the *detinet*, and after avowry pray that the defendant may gage deliverance.

De la Bastile v. Reignald. Cas. K. B. 57 & 425.

Or he may, upon a return of an *elongavit* to the *pluries* writ of replevin, have a writ to the sheriff, commanding him to take other beasts of the defendant in withernam; but if the defendant before the return of the withernam, appears to the writ of replevin, and offers to plead *non cepit*, it shall stay the withernam, for the defendant shall not be concluded by the return of an *elongavit*; for the sheriff can make no other return, where he cannot find the things to be replevied.

4 Term Rep. 510.

2. Where the defendant has had judgment of *retorno habendo*, and the plaintiff again makes replevin, he does it by writ of second-deliverance, which writ is given by stat. *West.* 2. 13 *Ed.* 1. *c.* 2., under which writ the right again may be tried; but the statute further enacts, "That if the party re-"plevying again makes default, or for any other cause, a re-"turn of the distress, now twice replevied, be awarded, the "distress shall remain irreplevisable."

CHAPTER

CHAPTER VIII.

The Action of Trespass.

1. TRESPASS, in the most extensive sense, means any injury arising to another's person or property from the misfeasance or act of another; and therefore all such injuries, though they assume different names, in fact, are actions of trespass: as assault and battery is a trespass to the person, &c.

The trespass which I shall here consider, is the action properly so called, and includes only *injuries to the lands or personal property of another.*

In treating of this action I shall consider, 1. The Nature of the action in general. 2. With reference to the Things on which it is committed. 3. With reference to the Person, *viz.* as committed by officers or by private Persons. 4. For what Trespass will not lie. 5. Who may maintain this Action. 6. The Pleadings. 7. The Evidence. 8. The Verdict, Judgment and Costs.

1. OF THE NATURE OF THIS ACTION IN GENERAL.

1. "Every entry upon the land of another is strictly an "injury, if done without the owner's consent; and at least "does the mischief complained of in the writ: *that of tread-* "*ing and beating down the plaintiff's grass*; for such injuries therefore this action lies." 3 Black. Com. 209.

But, however, in certain cases, the law has given *a right to enter upon the lands of another:* as if a man comes to execute legal process; to demand money; a landlord to distrain; a reversioner to see that no waste has been done; a traveller to get refreshment at an inn: all these are cases in which the law allows an entry, and so the entry is not a trespass. Ibid.

* So if a man makes a lease, excepting the trees, and he enters to shew them to a purchaser, he is not a trespasser. Lifford's case. 10 Co. 46.

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2. "But where the law allows such entry, or any act to "be done, *if the person misdemeans himself, or makes an un-* "*lawful use of the authority so given*, he shall be held to be a "trespasser *ab initio*; for from the subsequent act, the law "judges *quo animo* the first entry was made." Six Carpenters' case. 8 Co. 146.

Six Carpenters' case. 8 Co. 146.

As if a person enters into a tavern, which every man by law has a right to do; yet if he *steals any thing* from thence, his first entry shall be deemed unlawful, and him a trespasser *ab initio*.

Bagshaw v. Spencer. Cro. Jac. 147.

Oxley v. Watts. 1 T. Rep. 12. S. P.

So where to trespass for taking a gelding, the defendant pleaded that he took him as an estray, and so justified. The plaintiff replied that after the taking *he had laboured and worked him*. On demurrer it was objected: that the first taking being lawful, that the action should be *case* for the subsequent abuse but it was resolved, that the subsequent abuse of the estray being unlawful, made the defendant a trespasser *ab initio*, and that so the action well lay.

Lynne v. Moody. 2 Stra. 851.

But where the plaintiff brought trespass for breaking and entering his house, and *taking an excessive distress*, it was adjudged that this action would not lie; for the *taking was lawful*, and no subsequent abuse appeared to make the defendant a trespasser *ab initio*.

As the most frequent cases which occurred under this head happened where goods or cattle had been taken lawfully for a *distress*, but from some subsequent abuse or mismanagement the party was, acccording to the doctrine now delivered, made a trespasser *ab initio*, when in fact the first taking was lawful; this hardship was remedied by statute 11 *Geo.* 2. *c.* 19. which enacts, "That a distress for rent "shall not be deemed unlawful, nor the party be deemed a "trespasser *ab initio*, for any irregularity in the subsequent "disposition of it: but that the party aggrieved might re- "cover full satisfaction for the special damage he shall have "sustained thereby, and no more, in an action of trespass, "or on the case, unless tender of amends has been made "before."

Wallace v. King. H. Black. Rep. 13.

Since this statute, *trover* will not lie for goods taken under an irregular distress, as tending to place the landlord in the same situation he was before the passing of the statute, by considering him as a trespasser *ab initio*.

This statute therefore only affects *the subsequent disposal of the distress*; so that it seems that this action still lies for an *unlawful taking*; as if the distress had been made at night for rent: so if of beasts of the plough, when other sufficient distress can be had: so if doors have been broken open to make it; for the outer door can in no case be broken open, except under the direction of stat. 11 *Geo.* 2. *c.* 19. which empowers the party to do it "in the presence of a constable "or peace officer, oath being made before a justice, of there "being good grounds to suspect that the goods intended to "be distrained have been conveyed away, and are contained "in such house."

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Co. Litt. 161.

But

But however, when trespass was brought, for breaking and entering the plaintiff's house and taking his goods, and the case in evidence was, that the defendant having with him a constable, had entered the plaintiff's house to make a distress for rent; after he had told his business and begun to take an inventory, the plaintiff's wife tore his paper, beat him and the constable out, and then blocked up the door. About an hour after, the defendant *with several others returned, and demanded admittance, which being refused, he broke open the doors.* It was ruled by Justice *Wilmot*, That the distress having been lawfully begun and not deserted, but the defendant compelled to quit it by violence, that this was a re-continuance of the first taking, and so was lawful; though he could not when he first came have so broken open the doors. Francombe v. Pinche, Worcester Lent Ass. 1766. MSS.

But in case of a distress for rent, if the outer-door is open, the person distraining may justify breaking open an inner-door or lock to find any goods which are distrainable. Browning v. Dann. 9 Geo. 2. Bull. N. P. 82.

That statute applies to cases where the distress is for rent; but a similar provision has been made in other cases: as by stat. 17 *Geo.* 2. *c.* 38. it is enacted, "That where any distress "is made for *money justly due for the relief of the poor* that it "shall not be deemed unlawful, nor the party making it a "trespasser, on account of any *defect or want of form in the* "*warrant of appointment of overseers; or in the rate or assess-* "*ments; or in the warrant of distress thereupon:* nor shall "the party be deemed a trespasser *ab initio* on account of "any irregularity which shall be afterwards done by him; "but the party grieved may recover for the special damage, "unless tender of amends has before been made." Cas. temp. Hard. 168.

And the warrant may be made to distrain before the time for which the rate is expired, and is good. Charlwood v. Best. Westm. 1748. Bull. N. P. 82.

But where a person apprehends a rate for the relief of the poor is illegal, and a distress is made on him for it, he cannot bring trespass for the taking, for he should have appealed to the sessions. Durrant v. Boys. 6 T. Rep. 580.

But though trespass may lie for taking beasts of the plough as a distress for rent, where other beasts may be had; yet in the case of distress for *poor's rates*, it is lawful to take them, though other distress may be had: for it is not properly a common law-distress, but is rather in the nature of an *execution*: in which case there is no such exemption. Hutchings v. Chambers. 1 Burr. 579. [383]

3. "Trespass *vi et armis* must always suppose a *misfeas-* "*ance*; for it will not lie for a bare non-feasance, which, as "it supposes no act, carries no trespass."

As if a person enters a tavern, if he steals any thing, he is a trespasser *ab initio* for the misfeasance; but for not paying for the wine he has had, no action of trespass lies. Sir Carpenter's case. 8 Co. 146.

4 Burr 2092.

4. "To constitute a trespass, for which *this* action is maintainable, the act causing the injury must be *voluntary*; "and with some degree of fault; for if done involuntarily "and without fault, no action of trespass *vi et armis* lies."

Milton v. Faudrye. Poph. 161.

As here in trespass for chacing the plaintiff's sheep, the case was, that the plaintiff's sheep being trespassing on the defendant's ground, the defendant chaced them off with a dog: which dog *had followed them into the plaintiff's own ground*, for which this action was brought, but was held not to lie; for the defendant might justify chacing the sheep off his own ground, and as the dog could not be suddenly called in, the trespass and injury was involuntary; it appearing that the defendant had called the dog in when off his ground.

Beckwith v. Shordike & Hatch. 4 Burr. 2092.

But where the defendants were out with dogs and guns, and coming on the plaintiff's ground adjoining to his paddock, one of their dogs killed one of the plaintiff's deer: it appearing that they were not in any pathway or road, the injury proceeded from some degree of fault, and could not be said to be an accidental and involuntary trespass; so the plaintiff had judgment.

"And on the same foundation, though the injury has pro- "ceeded *from mistake*, this action lies: for there is some "fault from the neglect and want of proper care; and it "must have been done voluntarily."

Busely v. Clarkson. 3 Lev. 37.

As where the trespass laid was for cutting the plaintiff's grass and carrying it away: The defendant pleaded, that his land adjoined that of the plaintiff, and that *by mistake* in cutting his own grass, he had cut part of the plaintiff's which was the trespass, &c., and tendered amends. The plaintiff demurred, and had judgment: for it appeared that the fact was voluntary, and through some degree of fault, and his intention and knowledge are not traversable.

5. "To maintain this action property is necessary."

Wilkins v. Despard. 5 T. Rep. 112.

For where a ship or goods are seized by a governor of a foreign settlement as forfeited under the navigation act, 12 *Car.* 2. *c.* 18. trespass will not lie, for by the seizure the property is completely divested out of the owner.

"But property alone without possession will not enable the party to maintain trespass."

Ward v. Macauley & al. 4 T. Rep. 489.

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For where the plaintiff being landlord of an house, let it ready furnished to Lord *Montfort*, and the lease contained a schedule of the furniture: an execution having issued against Lord *Montfort*, the defendants, who were the sheriffs of *Middlesex*, seized, under an execution, the goods in question, which were part of the furniture so contained in the schedule; it was decided, that the action should have been trover, and that trespass would not lie, this action being

being founded on possession, which was necessary to maintain it, though a constructive possession, as where the goods were lost by a carrier or servant, might be sufficient to maintain it.

These are the *general grounds* of this action: the more particular cases in which it is maintainable, are now to be considered with reference to the things on which the action may be committed.

2. OF TRESPASS, WITH REFERENCE TO THE THINGS FOR WHICH IT LIES.

These are, 1st, Injuries to the Rights of Tenants. 2d, To the land from Damage-feasant. 3d, To the rights of Fishery. 4th, To the rights of Tolls and Customs, 5th, To Markets and Fairs. 6th, From Hunting or Pursuit of Game. 7th, To Highways.

1. OF INJURIES TO THE RIGHTS OF TENANTS.

1. If there is lessee for life or years of lands, the lessee has no property in the trees growing on the land, and even if the clause in the lease is without impeachment of waste, it gives him no property, but is merely an exemption from an action. Yet if a stranger cuts any down, the lessee may maintain trespass, but he shall not recover damages for the *value of the trees*, because the property of them is in him in reversion; but the damages shall be for *cropping and breaking his close, and perhaps for the loss of shade*, &c. Herlakenden's case. 4 Co. 62. a.

So by common law, though tenant for life or years is entitled to house-bote, hedge bote, &c. yet a *copyholder* is not; and if he takes trees for that purpose, he is a trespasser; but he may have such right by custom of the manor. Lord Montague v. Shepherd. Cro. Eliz. 5.

2. Another case in which *tenants for life, years, or at will*, are liable to or may have an action of trespass, is in the case of the *emblements or croft growing on the lands, on the determination of their estates.*

" As to which it is a general rule, That where the estate " is of an uncertain duration, that there the tenant shall be " entitled to the emblements."

Therefore, if a man is *tenant for life*, and sows the land, but dies before harvest, his executors shall have the crop: so if a man is tenant *per auter vie*, and *cestui que vie* dies. The land being sown, the tenant *per auter vie* shall have the emblements on the same principle, the estate being determined *by the act of God.* Co. Litt. 55. [385]

So where the estate is determined by *act of law*, it is the same: as if a lease be made to a man and his wife *during coverture*, and the husband sows the land, and afterwards, by sentence of the spiritual court, the marriage is dissolved, the 5 Co. 116 b.

the husband shall have the emblements; for the sentence was *in invitum*, and the act of law.

5 Co. 116. b.

" But where the estate for life is determined *by the act of* " *the lessee himself*, there he shall not have the emblements.

Orland's case. 5 Co. 116. a.

As where a woman tenant *durante viduitate* sows the land, and afterward took husband, whereby her estate was determined by her own act, it was determined that the lessor should have the emblements. So if the lease is till lessee commits waste, if he sows the land and commits waste, he shall not have the emblements; for the *determination of the estate was by his own act*.

Cro. Eliz. 461.

But if the lessor, who is *tenant for life*, determines his estate by his own act, his lessee shall not lose the emblements, though the lessor would, because that to bar the lessee the forfeiture must have arisen *from his own act*.

Per Popham, Cro. Eliz. 461.

The case is the same of *leases at will*; for if lessee at will sows the land, if the lessor determines his will, the lessee shall have the emblements; but if the lessee at will himself determines it, he shall not have them, for it was his own act.

Co. Litt. 55b. 5 Co. 116. b.

So if a man makes a lease at will and the *lessor is outlawed*, by which his estate is determined, yet shall the lessee have the emblements; but if the *lessee himself had been outlawed*, by which his will is determined, the king shall have the emblements.

Litt. s. 68.

" But where the estate is of certain duration, as a lease " for years, if lessee in such case sows the land, and his term " is ended before the corn is ripe, in such case the lessor, " or he in reversion, shall have the crop, and not the tenant; " for the lessee knew when his term would end."

But though this rule is general, yet it admits of certain exceptions arising from the custom of the country.

Wigglesworth v. Dallison. Dougl. 190. *[386]

As where the plaintiff brought an action of trespass for mowing and taking away a crop of corn, and relied on a custom, that the " tenant for any term of years which expired on the 1st of *May*, *might*, after the expiration of his term, take and carry away, as his waygoing crop, all the corn then growing on the land at the time the term expired." This custom was adjudged to be good and reasonable, though contended that the lessee could not claim it against his deed, by which the land had been demised for a certain number of years, then expired.

Beaver v. Delahay & al. H. Black. Rep. 5.

So a custom that the tenant might leave for a certain time his waygoing crop in the barns of the farm, which he had left after the determination of his term, and after his quitting the premises, is good; and the corn so left may be distrained,

distrained, even though six months are expired from the end of the term.

" In these cases, therefore, where either party is entitled " to the emblements, he may have trespass for any moles- " tation in taking and carrying them away; and he is also " entitled to free entry, egress and regress, to cut and carry " the crops away." Litt. s. 68.

3. " Trespass or trover will lie for taking goods which " are not the objects of distress."

Five things by common law are not distrainable: 1st. Things annexed to the freehold: 2d, Things delivered to persons exercising their trade; as cloth to a tailor, &c.; 3d, Corn, hops, &c. growing: 4th, Instruments of tillage or trade; as beasts of the plough, &c.; 5th, Instruments of trade while in use (*Co. Litt.* 47.) As to the first and second, they are privileged still; and corn is distrainable now by virtue of stat. 2 *W. & M. c.* 5. 4 T. Rep. 561.

As to others they are privileged *sub modo*; and as to these it has been decided, 1st, That a chariot of a stranger *standing at a livery stable*, was not privileged from distress; but that it might be distrained by the landlord of the livery-stable for rent-arrear. Francis v. Wyat. 3 Burr. 1498.

So wearing apparel, not in actual use, may be distrained for rent-arrear. Baynes v. Smith. Espin. N. P. Cas. 206.

And even where a landlord had distrained the clothes of a person while in bed, and which he meant to put on in the morning, it was held that he might lawfully do it, on the principle of their not being in actual use. Bissett v. Caldwell. Sitt. Hill. Term. 31 G. 3.

2. That implements of trade (as in this case three weaving looms) might be distrained for rent, *if there was no sufficient other distress then to be had on the premises.* Gorton v. Faulkener. 4 T. Rep. 565.

3. But if such implement of trade be in actual use, (as in this case, where the plaintiff's apprentice was weaving, and the loom was distrained,) such cannot be distrained. Simson v. Harcourt. Mich. 18. G. 2. C. B. cited by Buller, Just. 4 T. Rep. 568.

2. OF INJURIES FROM THINGS DAMAGE-FEASANT.

1. " Where an injury has been done by the cattle or " goods of any one to the lands of another, he who receives " the injury *may either distrain them damage-feasant, or bring* " *his action of trespass quare clausum fregit*, and recover for " the damage sustained." [387]

" But he should make his election of his remedy; *for if* " *he distrains, and the distress escapes, the action of trespass is* " *gone*, unless the escape was not through his fault or neglect."

For

Vasper v. Eddowes. Salk. 248.

For where the plaintiff declared in trespass *quare clausum fregit*, the defendant pleaded, that the plaintiff had *distrained* his hog damage-feasant, which was the same trespass: the plaintiff replied, *that the hog escaped without his consent*, and that he was yet unsatisfied of the damage. The defendant demurred, and had judgment: as it did not appear that it was *without his fault* as he had only pleaded that it was *without his consent*.

Ibid.

But if the distress *dies* in the pound, the action of trespass is restored; for such is the act of God, which shall not deprive the party of his remedy.

2. "He who has the care, custody, or possession of the "cattle who do the damages, is liable to this action."

Dawtry v. Huggins. Clayt. 33. Tri. p. Pais, 201.

As if *agisted cattle* break into another land, the agister is liable to the damages: so if the hogs of *A.* were put into the yard of *B.* and they break into *C's* land, action lies against *B.* even though *A.'s* servant watched them: and so the owner had a special possession.

3. OF INJURIES TO THE RIGHTS OF FISHERY.

As to this it has been decided,

Case of the Royal fishery of the River Bann in Ireland. Dav. Rep. 149.

1. A man may have a proper and several interest as well in a fishery as in water, or a river, for a man may grant *aquam suam*, and the fishery shall pass.

2. The sea belongeth to the king; and also every navigable river, so high as the river ebbs and flows, is a royal river; for so far it is considered as a branch of the sea, and belonging to the crown: but rivers not navigable are the property of the proprietors of the lands on both sides the river; that is, if both sides belong to one owner, the whole river is his; if to two persons, the river is in moieties. But in the case of the crown, there is a difference in respect to granting the land from that of a subject; for by a grant of the land in the case of a subject, the fishery would pass; but in the case of the crown, by a grant of the land adjoining a navigable river, or royal fishery, the fishery would not pass, for it is an inheritance in gross in the crown, and parcel of the inheritance of the crown itself; but it may be specially granted *by grant of the fishery* from the crown.

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Same case.

Upon these grounds the several distinctions of the rights of the fishery are formed, *viz.* free fishery, several fishery, and common of fishery.

I. As to a *free fishery* it is the exclusive right of fishing in a navigable river or arm of the sea; and this must be claimed by prescription, or grant from the crown; for

S. C. and Warren v. Matthews. Salk. 137.

The right of fishing in navigable rivers is common to all the king's subjects; and therefore an exclusive right must be

be derived from the grant of the crown, in whom that exclusive right originally resided. But the prescription should be as old as the reign of *Henry* II.; for the charters of king *John* and *Henry* III. avoid all such grants from the beginning of the reign of *Richard* I., and prohibit the fencing of rivers in future; so that no grant of a free fishery shall be good, if made since that time. 2 Black. Com. 139.

2. This is also the same of a *several fishery*, which is also an exclusive right derived in the same manner, but with this additional circumstance, that it should be claimed by a person who owns the soil, as the land adjoining to a navigable river; and it was accordingly held to be good where the plaintiff in this case claimed a several fishery in the river *Severn*, where it was navigable, as part of his manor of *Arlingham*, which adjoined the river: and recovered accordingly. 2 Black. Com. 139. Carter v. Murcot. 4 Burr. 2162.

"But it is not necessary to constitute *a several fishery*, that "*all other persons should be excluded*; it is sufficient that no "person shall have a *co-extensive right*; for a partial right, "as to take for a particular purpose, does not destroy the "nature of a several fishery." Per Lord Mansfield. 5 Burr. 2817.

As where the plaintiff was grantee of a several fishery, but the grantor had reserved to himself the oysters and fish for his own table; and having declared as possessed of a *several fishery*, the judge nonsuited him, deeming the right so reserved to the grantor as destroying the nature of a several fishery, which he supposed should be *exclusive* of all others. But the court of *King's Bench* set aside the nonsuit, holding the doctrine as before delivered by Lord *Mansfield*. Seymour v. Ld. Courtney. 5 Burr. 2814.

But where a man claims such free or several fishery, he must shew his title, and the *onus* lies on him; for the claim is derogatory to the common right of the subject. Warren v. Matthews. Salk. 137.

*And he who has either of these species of fishery may have trespass for taking the fish; for he has a property in them. Anon. 1 Mod. 105. Smith v. Kemp. Salk. 637. *[389]

3. Common of *piscary* is a right of fishing in the waters of another, in common with others; and it differs from a several fishery, that in this last the owner has a property in the fish before they are caught; but in the case of common of *piscary*, not till they are taken.

4. OF INJURIES OF THE RIGHTS OF TOLLS AND CUSTOMS.

Where goods have been distrained for tolls or customs, the person whose goods have been so distrained may bring this action for the taking, in which the right to the tolls is tried.

tried. But the cases under this head have already been treated of in the action of *Replevin*.

So for an unlawful taking of any thing for an amercement in a court-leet.

5. OF INJURIES TO FAIRS AND MARKETS.

Mayor of Northampton v. Ward, 1 Wils. 107. 2 Stra. 1239.

1. Every one of common right has a liberty of coming to buy and sell without paying any toll, &c., unless due by custom or prescription. But if a person requires any particular easement, as a stall, he must have the licence of the owner of the soil; for the property of the soil still remains in the owner of the land, and he dedicates it no farther to the use of the public than the right of entry to buy and sell. This right, therefore, of erecting a stall for exposing things to sale in a market or fair, is called Stallage, and is a sum which the owner of the soil has a right to for his permission. If the ground is broken, it is called Picage.

Ibid.

If any person, therefore, comes into a market and raises a stall without the owners of the soil's leave first obtained, this action lies against him, for he is thereby a trespasser.

Mayor of Launceston's case. Cro. Eliz. 75. & Cro. Eliz. 628. S. P.

And it should seem that trespass is the only action; for it is said (*Stra.* 1238.) that debt or assumpsit would *not lie* for the sum due: and it is decided in this case, that goods brought to a market cannot be *distrained* damage-feasant.

Mayor of Norwich v. Swann. 2 Black. Rep. 1116.

2. So this action lies for erecting *tables* upon which wares are exposed to sale; for it is an use of the soil which belongs to the owner, and similar to stalls in the use made of them.

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6. OF INJURIES FROM HUNTING, OR THE PURSUIT OF GAME, &c.

As to which these decisions have taken place:

Gaush v. Mynns. Cro. Jac. 321.

1. Any person may *justify going* upon the lands of another *in pursuit of ravenous beasts*, as foxes, badgers, &c., but it will *not justify a person to break the ground or dig* for them: for the taking of them is of public benefit.

Gundry v. Feltham. Trin. 26 G. 3. Term Rep. 334.

So it will not justify any excessive or unreasonable damage to the land of another, for the justification is only as to the *following*, and should be done with as little damage as possible. And therefore if to trespass for such cause, the defendant justifies as following the fox or such beast, and in fact has committed unnecessary mischief, the plaintiff should make a new assignment of the excessive and unnecessary injury.

2. By statute 22 & 23 *Car.* 2. *c.* 26. gamekeepers, properly nominated, or other persons (authorised by warrant from a justice of peace) may search for and seize instruments for destruction of the game.

3. " Where

Under this statute it has been held,

1. That gamekeepers, in making a search, should have a justice's warrant, founded on an information. Carpenter v. Adams. Comb. 183.

2. A gamekeeper, properly apppointed, has a right to *keep and carry a gun or other instrument to take game any where*, but a right *to kill it only on his own manor*. Therefore, where the plaintiff, who was a gamekeeper, had followed the game off his own manor, and the defendant took his gun from him, trespass for taking and carrying away the gun was held well to lie; for he was entitled by law to keep it: though he had been liable to the penalty for killing game off the manor. Rogers v. Carter. 2 Wils. 387.

3. By stat. 9 *Ann. c.* 25. a lord of a manor shall appoint but one gamekeeper, and by stat. 3 *Geo.* 1. *c.* 11. the person so appointed should be either a person qualified himself, or a menial servant of the lord, or appointed and employed to kill game for the sole use of the lord.

This clause does not prevent the lord of a manor from appointing any person as his gamekeeper, though neither qualified, nor a menial servant: for the statute never meant to take from lords of manors, living at a distance, the power of appointing a person to kill game for their use. Per Cur. 3 Wils. 389.

7. OF INJURIES TO HIGHWAYS.

By setting out an *highway*, the owner does not part with the property of the soil. And therefore where the *defendant owned land adjoining to the highway, which was the soil of the plaintiff, but separated by a ditch, and he laid a bridge over the ditch to the highway, it was held, that the plaintiff might have trespass for it; for the soil was appropriated only to the purpose of an highway, and it was not lawful to use it in any other manner. Sir John Lade v. Shepherd. 2 Stra. 1004. *[391]

3. OF TRESPASS, WITH REFERENCE TO THE PERSON.

That is, 1st, As committed by *Officers*, or Persons entrusted with some Authority by Law: 2dly, *By private Persons*.

Injuries by Officers, are, 1st, By the Sheriff and his Officers. 2dly, By Justices of Peace: 3dly, By Officers of the Excise or Customs. Terry v. Huntington. Hard. 490.

1. OF TRESPASS AGAINST THE SHERIFF OR HIS OFFICERS.

1. Where the *subject-matter of any suit is not within the jurisdiction of the court* applied to for redress, every thing done is absolutely void, and the *officer* executing the process is a

Case of the Marshalsea. 10 Co. 76: a. b.

trespasser. But where the subject-matter is within the jurisdiction of the court, but the *want of jurisdiction is to the person or place*, unless the want of jurisdiction appears on the process to *the officer who executes it, he is not a trespasser*.

But in the case of constables, a particular exemption is given by stat. 24 *Geo.* 2. *c.* 44. which enacts, "That no "constable shall be answerable for obeying a justice's war- "rant, notwithstanding any defect of jurisdiction in the jus- "tice who issued it."

Turner v. Pelgate. 1 Lev. 95. 1 Sid 272. Adams v. Sparry. 2 Wils. 155.

2. *If judgment is vacated* as unduly obtained, and restitution awarded, (as where the writ of execution was made returnable on the essoign day, the suit being by bill, in which case the execution was set aside, and the goods ordered to be restored) the defendant in the first action may bring trespass against the plaintiff for taking the goods; for by vacating the judgment, it is as if it had never been: but it is otherwise *of a judgment reversed for error*, for then no action lies, for it is the fault of the court; but an irregular judgment is the fault of the plaintiff, or his attorney. But in such case of an irregular judgment no action lies against the officer, for he is justified by the writ.

2 Wils. 384. *[392]

*So that the rule as to justification under process of any court is, that if the court has jurisdiction, but their proceedings are irregular, trespass lies against the plaintiff in the action for taking the goods, but not against the officer: but if the court has not jurisdiction, the officer is liable.

Sanderson v. Baker & Martin. 2 Bl. Rep. 832. 3 Wils. 309. S. C. Ackworth v. Kemp. Dougl. 41. S. P.

3. If a *fieri facias* is directed to the sheriff to take the goods of a person in execution, and he directs his warrant to his bailiffs for that purpose, *if they take the goods of another person* by mistake, trespass lies *against the sheriff*; for he is liable for the acts of his officers acting under colour of his authority.

As it therefore often happens that the goods of a person against whom a *fieri facias* is expected, are conveyed away or transferred by bill of sale; how far the property remains in such case, is settled by the *Statute of Frauds*, 29 *Car.* 2. 5.

Cro. Eliz. 174. Ed. 440.

By the common law the goods of the defendant were bound from the teste of the writ, and therefore if the defendant had aliened his goods after, or on the day of the teste of the writ of execution, the sheriff might take the goods in the hands of a purchaser. It was therefore enacted by that stat- "ute, "That the goods should not be bound from teste, but "from the delivery of the writ to the sheriff, who is to in- "dorse, on receipt of it, the day and month on which he re- "ceived it."

Per Hardwicke, Ch. Just. 2 Eq. Cas. Abr. 384.

1. Under this statute it has been held, that neither before the statute of frauds nor since, is the property of the goods

goods altered, but remains in the defendant *till execution executed:* and the meaning of these words, "That the goods shall be bound from the delivery of the writ to the sheriff," is, that after the writ is so delivered, if the defendant makes any assignment of his goods, *except in market overt*, or by becoming a bankrupt, which is an assignment in law, the sheriff may take them in execution.

2. This statute relates only to protect the goods in the hands of *purchasers*; that is, to cases where the goods are *sold bona fide*; for if the party dies after the teste, but before the delivery of the writ to the sheriff, the goods are bound in the hands of his executors; for such is not a change of property by sale, or for a valuable consideration. Comb. 145. Anon. 2 Vent. 218. S. P.

3. So if a writ of execution is delivered to the sheriff, and *the defendant becomes a bankrupt before it is executed*, the execution is thereby superseded, and the goods not bound by the delivery, for the property ceases to be in the bankrupt from the time of the act of bankruptcy committed. Per Lord Holt. Lord Raym. 252.

" But in such case the sheriff shall not be made a tres- [393]
" passer by relation for any subsequent disposal of them;
" though he would be subject to an action of trover."

For where the goods of a trader were taken in execution, after an act of bankruptcy committed, by the defendant who was sheriff, but before the sale the commission was sued out, and a provisional assignment made, of which he had notice, but notwithstanding, he sold the goods; *this action* was held not to lie, though trover might; for the *taking* was rightful and legal, and the conversion only unlawful, he having had notice that the property was changed. Smith v. Miles. 1 T. Rep. 475.

4. *So the statute extends not to bind the king*, for he is not named; and by stat. 33 *H.* 8. *c.* 39. if the king and a subject have both actions against the same person, the king's execution shall have place, provided his suit was commenced at any time *preceding the judgment* given for the other person; and therefore the goods are liable in such case, in whose hands soever they be. Post. ch. of Trover, vid. for constructions on this statute.

5. But though possession be regularly taken of goods, yet the *officer must remove them to a place of safe custody in a proper time*; for where he kept possession of them on the premises, under an attachment from an inferior court, for an unreasonable length of time, *viz.* six months, he was held to be a trespasser *ab initio*. Reed v. Harrison. 2 Black. Rep. 1218.

6. It is not lawful for the sheriff, or his officers, *to break the house* of any person to execute process of *fi. fa.* against the goods, or *capias* against the person, at the suit of a subject: and if the sheriff or his officers do so, he is a trespasser, and liable in this action. Semayne's case. 5 Co. 91.

But

S. C.

But this privilege is only confined to the person or goods of the *owner of the house*, or such as are brought there, without fraud or *covin*, and therefore shall not protect the person or goods of any other which are brought there to prevent a lawful execution; and therefore in such case, *after denial and request*, *the* sheriff may break doors to do the execution. But in such case a demand of the delivery of the goods is necessary, for if he breaks the house without making such demand, he is a trespasser.

Day v. Bilbitch. Cro. Eliz. 374.

7. Things fixed to the freehold cannot be taken in execution, and therefore for such taking trespass will lie.

Bull. N.P. 91. Britton v. Cole. Salk. 395.

8. A *fieri facias* is *de bonis & catallis debitoris*, and therefore under it the *debtor's goods only* can be taken in execution. But a *levari facias* is *de exitibus terræ*, and therefore under it the sheriff may take the cattle of a stranger *levant* and *couchant*, for they are the issues of the land (*St. West.* 2. *c.* 32. 2 *inst.* 473) and the land is debtor. And such is the case of tenants in common, or commoners; for their cattle may be taken on the land unless their title be found by inquisition, or till avoided by *monstrans de droit*. The law in this case is the same as if the taking was under an outlawry.

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2. OF TRESPASS AGAINST JUSTICES OF PEACE, OR PERSONS ACTING UNDER AUTHORITY FROM THEM.

1. These are also subject to this action, if by any illegal proceeding they take the goods of any person. But as to justices of peace, it is enacted by statute 27 *Geo.* 2. *c.* 20. "That in all cases where a justice of peace is empowered "by an act of parliament, made or to be made, to issue a "warrant of distress, it shall be lawful for him in such "warrant to order the goods distrained to be sold within a "certain time limited by such warrant, so that it be not "less than four or more than eight days, unless the money "for which the distress was made, and all charges, be sooner "paid."

Padfield v. Cabball. Tr. 16, 17 G. 2. C. B. Bull. N. P. 83.

And *note*, That a warrant *ex vi termini* only means an authority; therefore, if under the hand of a justice, it is sufficient, without being under seal, unless particularly required by act of parliament.

2. "A constable to whom a warrant is directed must act "within his district, or he shall be liable to an action of "trespass."

Blatcher v. Kemp. 2 H. Black. Rep. 15.

To trespass for entering the plaintiff's house, the defendant justified under a justice's warrant to search for nets: the warrant was produced, and appeared to be directed "to the constable of *Shipborne*, *Samuel Carter*, and to all other officers of the peace of the county of *Kent*;" evidence was given, that

that the defendant was borsholder of *Little Peckham*, which adjoined to the hundred of *Shipborne*, in which the plaintiff's house was: it was contended for the defendant, that he was a constable for the county, and came under the general direction of "all officers of the peace of the county of *Kent*;" but it was resolved that these words were to be taken *reddendo singula singulis*; that is, that each constable should act within his own district, and could not act by law out of it without being a trespasser.

9. The third case of actions against officers, are those founded on the revenue laws.

3. OF TRESPASS AGAINST OFFICERS OF THE EXCISE OR CUSTOMS. [395]

1. By stat. 13 & 14 *Car.* 2. *c.* 11. *s.* 5. "Any person "authorised by writ of *assistance* out of the court of *Exche-* "*quer*, may (taking a constable or other officer with him) "*in the day time* enter any house or place; and in case of "resistance, break open doors, chests, or packages, and seize "any unaccustomed goods he shall find there."

1. Under this statute it has been held, that trespass lies against *custom house officers* for entering the house of any person in search for smuggled goods, *if none are found*, for the officer does it at his peril. 2. Though the officers have a writ of assistance, yet if *they have no constable with* them, they are trespassers even if smuggled goods have been found. 3. And though they have with them a constable, yet *if he was not constable of the place where the search was made*, they are trespassers.

Bruce v. Rawlins. 3 Wils. 61.

Redshaw v. Brook. 2 Wils. 405. S. P.

"And no custom-house officer has a right to seize goods "liable to duty before they are landed, or offered to sale."

For where the plaintiff's ship, lying in the *Thames*, with butter on board from *Ireland*, the defendant, a custom-house officer, went on board, and *before the hatches were opened or bulk broken, or any goods landed or offered to sale*, seized the butter as contraband: the Court were on a case reserved all of opinion, that the seizure was unlawful, as the goods had not been landed or exposed to sale; and they grounded their opinion on stat. 18 *Car.* 2. 2. & 20 *Car.* 2. 7.

Smyth v. Reynolds. 2 Wils. 257.

In searches by *excise-officers* for goods which have not paid the duty, *by night*, the presence of a constable or peace-officer is required by stat. 8. *Ann. c.* 9. and stat. 10 *Ann. c.* 19. *s.* 12.

Where searches are made by excise-officers, the constable or peace-officer must *be of the place* where the search is made; it is not sufficient that the person accompanying them is *an officer by reputation*. As here, where it appeared that

Hill v. Barnes. 2 Black. Rep. 1735.

that the person had formerly been head borough of a parish, and had a board over his door with that name on it, but was out of office, and was by mistake applied to by the excise-officers in their search, they were adjudged to be guilty of trespass.

Leglise v. Champante. 2 Stra. 820. [396]

3. Though an officer proceeds regularly in the seizure of goods, yet it depends on the condemnation, whether the taking shall be deemed legal or not; for if the goods are not condemned, he is a trespasser.

Bostock v. Saunders. 3 Wils. 434.

By statute 10 *Geo.* 1. *s.* 13. *c.* 10. power is given to officers of excise to search at all times of the day entered warehouses or places for tea, coffee, *&c.* But private houses can only be searched on oath of the suspicion before a commissioner or justice of peace, who can by their warrant authorise a search. Under such a warrant obtained by the officer, on his own oath of suspicion, if a search is made in a private house, and no goods found, the officer is liable to an action of trespass, and the warrant shall be no justification; for the commissioners have no power to inquire into the circumstances, and the officer takes the whole on himself.

Boot v. Cooper & al. 1 T. Rep. 535.

But this case has since been over-ruled, and it was in this case decided, that in an action of trespass against an officer of excise, for entering the plaintiff's house under a warrant of two commissioners, founded on stat. 10. *Geo.* 1. *c.* 10. to search for concealed goods, *but none were found*, that the *defendants were not trespassers*, the act itself being legal; but that the only remedy was by an action on the case, for obtaining and executing the warrant from bad motives.

Scott v. Shearman & al. 2 Black. Rep. 977.

4. But a condemnation of the goods seized *in the Court of Exchequer* is so conclusive, and alters the property so effectually, that neither trespass nor trover will after lie against the officer; for if an action would lie against the officer, the goods being bound by the condemnation, the judgment against the goods would be defeated by suing the officer.

Horne v. Boosey. 1 Stra. 952.

" Though it should seem that this is only in the case of " *officers* seizing within their own department;" for where a person not the proper officer, made a seizure, he was held liable to this action, though the goods had been condemned.

Henshaw v. Pleasance. 2 Black. Rep. 1174.

But a condemnation of the goods is only conclusive evidence in favour of the officer, *when it is made in the Court* of *Exchequer*, and does not extend to any other condemnations by inferior jurisdictions, as the boards of excise and customs. For in this case, after a condemnation by the board of excise, the owner of the goods recovered in trespass against the officers, and their sentence was adjudged not to be conclusive evidence.

5. Where

5. Where goods are seized, the question often turns upon whom the *onus probandi* the payment of the duty lies.

Before the statute 6 *Geo.* 1. *c.* 21. if an officer went into a trader's house to make a search, an action lay against him for the trespass, unless he could prove that the goods therein were forfeitable. It was therefore provided by this statute, "That the officer should be protected who acts *bona fide*, "and on probable presumption, even though he mistakes in "the following cases: 1. Where goods are on board a "boat, without any officer. 2. Where they are coming "by the water-side. 3. Where there is credible informa- "tion. In all cases of seizure under these circumstances, "as the officer is not liable to an action, the owner may "apply to the commissioners, who, on proper circumstances "appearing, will restore the goods. If the owner does not "apply, the officer proceeds to condemnation in the *Ex-* "*chequer* by prosecution; and in such case, by *sect.* 41. *the* "*proof of the payment of the duties lies on the owner who claims* "*them in the exchequer.*" This clause, confining the mode of proof only to cases where application had been made to the commissioners, was made general by stat. 12 *Geo.* 1. *c.* 28 *s.* 8. which enacts, "That in all cases where foreign goods "are seized for non-payment of duties, &c. and any dispute "shall arise thereon, *the proof of payment shall lie on the owner* "*or claimer of the goods*, and not on the officer who has made "the seizure."

Per De Grey. Ch. Just. 2 Bl. Rep. 813.

These statutes relate *only to suits for condemnation in the Exchequer;* but in actions of trespass, brought by the owner of the goods against the officer, the proof of the non-payment lies on the officer who seized the goods.

Salomon v. Gordon & al. 2 Bl. Rep. 813.

The seizure in the last case was of goods for non-payment of the *custom-house duties;* but the same doctrine was held in the present case, on a seizure for non-payment of the duties *of excise*, *viz.* that the *onus probandi* the non-payment of the duties lay on the officer.

Menshaw v. Pleasance. 2 Black. Rep. 1174.

By statute 10 *Geo.* 1. *c.* 10. the proof of payment of the excise-duties on tea, coffee and chocolate, is laid on the owner or claimer in the *Exchequer:* but it extends not to actions of trespass.

And the same proof lies on the owner or claimer in the case of seizure of soap and candles, by statute 23 *Geo.* 2. *c.* 21. which also relates only to informations in the *Exchequer.*

6. By statute 17 *Geo.* 2. "All actions against revenue- "officers for any thing done in execution of their office, "must be brought within three months after the offence, "committed, and be laid in the proper county where the "fact

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" fact happened." *Vid.* 23 *Geo.* 3. *c.* 70. *s.* 3. & 24 *Geo.* 3. *sess.* 2. *c.* 47. *s.* 35.

" The three months within which actions must be brought " against custom-house officers, must be reckoned from the " *time of seizure.*"

Godin v. Ferris. 2 H. Bl. Rep. 24.

For where in this case the seizure was by a custom-house officer on the 11th of *May*, 1787, and was returned into the *Exchequer*, and in *February*, 1789, the plaintiff in the action obtained writ of delivery out of the *Exchequer*, which was not executed, the plaintiff not having given the necessary security, and this action was brought in 1790; it was held, that the plaintiff's action was barred, and it not having been commenced within three months after the seizure: though contended that the suit in the *Exchequer* being still depending, it was a continuance of the same trespass.

Ballard v. Whitfield. Per Lord Loughborough. Guildh. Pasc. 27 G. 3.

But though the *writ has been sued out* in a county where the offence was not committed, yet if plaintiff declares in the county where it was committed, it is good within the statute.

7. By stat. 19 *Geo.* 2. *c.* 34. *s.* 16. it is enacted, " That " if the judge certifies on the record that there was prob- " able cause for such seizure, in that case, beside the plain- " tiff's ship and goods so seized, or the value of them, he " shall not be entitled to above two-pence damages, and no " costs."

Under which statute it has been held,

Sullivan v. Montague. Dougl. 102.

1st, That this certificate may be given at any time after the trial. 2dly, That if a sentence which was in favour of the captor, is afterwards reversed in a superior court, and then the owner brings this action against the captor, a certificate from the judge of the superior court of appeal is good within the statute.

Baldwin v. Tankard. H. Black. Rep. 28.

By stat. 23 *Geo.* 3. a like power is given to the judges to certify where the seizure has been under *the excise laws.* " But it was in this case resolved, that the judge could only " certify *where the action was for the seizure of the goods*, not " where it was for other injuries accompanying the seizure." As where it was for breaking and entering the plaintiff's house, breaking his locks, and seizing the goods; it was resolved, that the judge's certificate of probable cause should not deprive the plaintiff of his full costs.

Entick v. Carrington. 2 Wils. 275.

4. *A general warrant from the secretary of state* to seize the person, papers, &c. of any one is illegal; and this action will lie *against the messengers* acting under it, for entering into the plaintiff's house, and seizing his papers.

2. or

2. OF TRESPASS AGAINST PRIVATE PERSONS.

1. Trespass lies at the suit of a person against whom a commission of bankruptcy has been sued, he not being an object of the bankrupt laws, *against the assignees under the commission*, for taking possession of his house, goods, &c.; for the commission is void, and of consequence the taking is without authority; and the person whose property has so been invaded, is entitled to a remedy: for every man should, in applying to courts of limited jurisdiction, know their extent and jurisdictions are circumscribed. 1st, *With regard to *place*; as a leet or corporation: so that the cause of action must arise within them. 2dly, With regard to the *subject-matter*; as questions on excise. 3dly, With regard to *persons*; as in the case of the *Marshalsea*; so in the present, the person declared a bankrupt not being an object of the bankrupt laws, is not within the jurisdiction of the commissioners. And in all the cases where the Court hold cognizance of matters not within their jurisdiction, their proceedings are void, as *coram non judice*; and trespass lies either against the officer (as before) or against the person who applies to their jurisdiction, and acts under their decisions.

Perkins v. Proctor & al. 3 Wils. 382.

Hard. 480. Case of the Marshalsea. 10 Co. *[399]

2. *Search warrants*, if issued on proper application, are legal, but must issue under these restrictions: as, 1. There must be an oath: 2. The grounds declared: 3. It must be executed in the day-time by a known officer: 4. In the presence of the party informing. And though all these precautions be observed, the person on whose suggestion and information the warrant issued, is liable to an action of trespass if nothing is found, for breaking and entering the house, for he is justified or not by the event: but it shall at all events justify the justice who grants the warrant, and the constable who executes it; for it is granted on oath.

Hale's P. C. 150.

3. By stat. 6 *Ann. c.* 18. "Guardians, trustees, husbands "seized in right of their wives, and tenants *per auter vie*, "holding over without consent, after determination of their "interests, are made trespassers.

4. If a *lunatic* commits a murder or felony, he shall not be punished; for it must be done *animo felleo*: but if he commits a trespass, either to the lands or goods of another, this action will lie.

Weaver v. Ward. Hob. 134. Arg.

4. FOR WHAT INJURIES TRESPASS WILL NOT LIE.

1. "Trespass will not lie against a *mere ministerial officer* "*for any thing done merely in pursuance of his duty*, though "it is somewhat in support of a wrong, but a wrong to "which he is no way accessary or assenting."

Badkin v. Powell & al. Cowp. 476.

As where a distress was tortiously taken, and impounded in the pound, of which one of the defendants was keeper, and an action was brought against those who took the distress *and the pound keeper jointly*. The action was held not to lie against *him*, for he acted merely ministerially, and was no way concerned in the tort.

S. C. *[400]

*But it was further the opinion of the Court in this case, that if he had *exceeded his duty and assisted in the wrong*, he would be a party in the trespass; and that then an action would lie against him.

2. By stat. 1 & 2 *P.* & *M.* c. 12. "No distress shall be "driven out of the hundred, except it be to a pound overt "within three miles of the place where taken, and in the "same shire; neither shall distresses be impounded in dif- "ferent places, under penalty of one hundred shillings, and "treble damages."

Gimbert v. Pelah. 2 Stra. 1272. Woodcroft v. Thompson. 3 Lev. 40.

If the person distraining impounds the cattle in another county, he is not a *trespasser*, for the taking was lawful; but it subjects him to the penalty of the statute 1 & 2 *P.* & *M.* c. 12. or an action on the case on the statute of *Marlbridge*.

Lynne v. Moody. 2 Stra. 851. &c.

3. So trespass will not lie *for taking an excessive distress*; for trespass will not lie where the first entry or taking was lawful, as here, rent being due, and there being no subsequent abuse, the remedy should be a *special action founded on the statute of Marlbridge, Chap.* 4. for at common law a man might take a distress of more value than the rent, as it was but in the nature of a pledge.

Allyn 83.

Herlakenden's case. 4 Co. 62. Litt. s. 71. Co. Litt. 57. a.

4. "Trespass *vi & armis* does not lie against *lessee for* "*years for cutting down timber trees, and carrying them away,* "*and selling them*;" but if after having cut them, he suffers them to lie, so as to give time for the property of the divided chattel to settle in the lessor, there trespass will lie, for it is not one continued act; and besides that, lessee for years has a special interest in the trees for repairs and shade; but if the lease had been with an exception of the trees to lessor, there if lessee cuts them he is a trespasser, like as lessee at will, against whom trespass will lie for cutting trees; for such acts determine his will. But, as against tenant by sufferance, lessor cannot have trespass before entry.

Clenham v. Henby. 2 Lord Raym. 739.

But even though the trees are excepted in a lease for years, yet if they are *destroyed or spoiled by lessee's cattle* breaking or topping them, no action of trespass will lie, for the defendant had the use of the soil, and the injury was done in the enjoyment of that to which the defendant had title, and without his fault.

5. "Wherever

5. "Wherever the law allows an entry on the land of another for a particular purpose, *as being for the good of the public*, trespass will not lie."

*As in the case of *highways*, which if they become impassable, as by the overflowing of a river or other cause, passengers may justify going on the adjoining fields: but the case is different of a *private way* over the land of another; for *there*, if the way becomes impassable, the person who is entitled to the way cannot justify going on the adjoining lands: for the grant of a way is only in a particular line, not to the right or left, and the grantor is not obliged to repair.

Abbot v. French. 2 Show. 28. Lev. 234. S. C. Taylor v. Whitehead. Doug. 716. *[401]

6. Trespass will not lie against the owner of *an estray* for taking him off the lands of the lord of the manor who had seized him, without paying for his keeping: for the owner had the property, and the lord may have *case* for the keeping, though he might have detained him till paid.

Lady Hatton v. Coles. Camb. Sum. Ass. 1667. T. per Pais 197.

"This case decides that the owner of an *estray* may take "him off the lands of the lord of the manor without tender of "satisfaction: but it has been clearly adjudged, that he may, "where he tenders satisfaction. &c. and the following points "been adjudged:"

1st, That without telling any marks or making any proof of the property, (which may be done at the trial,) the owner may seize his horse, &c., which was the *estray*, wherever he finds him. 2dly, That in pleading, it is sufficient for him to say that he tendered amends *without expressing any sum certain*, as he must do in pleading tender of amends for a trespass; and the reason of the diversity is, that in the latter case he is a wrong-doer: but the owner of the *estray* is not a wrong-doer, and it is impossible he should know how long the *estray* had been in the lord's custody, or what would be a proper satisfaction, and therefore pleading generally should be allowed.

Henley v. Walsh. 2 Salk. 686.

7. Trespass will not lie against the master or seamen of a king's ship or privateer for taking a vessel *as prize* on the seas, which capture is afterwards found to be illegal, and the ship been adjudged not to be a lawful prize in the Court of Admiralty: for questions of prize or not prize belong exclusively to the Court of Admiralty; and where it has jurisdiction of the principal question, it shall also have it of the incidental ones; and beside, the Court of Admiralty gives damages, &c. for the detention: therefore they shall not also be recovered in the courts of common law.

Rous v. Hassard, at the Cockpit, 22 March. 1749, quot. Dougl. 580.

Therefore, where one who had letters of marque in the *Dutch* war, took an *Ostender* for a *Dutch* ship, and brought her into harbour, and libelled her as a prize, and there was a sentence *that she was not a prize*, and the *Ostender* libelled in the Admiralty for the damages sustained *by hurt the ship received*

Turner and Cary v. Nele. 1 Lev. 243. Sid. 367. S. C.

received in port, and a prohibition was prayed on the ground that the injuries libelled for were done on land, and so that an action lay at common law; but a prohibition was refused, as the original capture was at sea, and the bringing her into port, in order to have her condemned, but a consequence of it: and not only the original, but the consequences should be tried in the Court of Admiralty.

Lindo v. Rodney. Mic. 22. G. 3. quot. Dougl. 501.

This question received a farther decision in a modern case, which was an application for a prohibition from the Court of Admiralty, to stay them from proceeding to condemn goods which had been captured at the island of *Eustatia* by Admiral *Rodney*, the property of *British* subjects, on the ground that *they had been taken on land*. The Court refused the prohibition, holding that an exclusive jurisdiction vested in the Court of Admiralty, and that the courts of common law had no cognizance whatever.

Doulson v. Matthews. 4 T. Rep. 503.

8. Trespass *quare clausum fregit* is a local action: and therefore it was resolved, that trespass for breaking and entering the plaintiff's house *in Canada* would not lie in this country.

5. BY WHOM THIS ACTION MAY BE MAINTAINED.

Co. Litt. 4. b.

1. "To maintain an action of trespass, *an interest in the* "*soil is not necessary*: an interest in the profits is sufficient: "as he who was *vestura terræ*, or *herbagium*, may have tres- "pass *quare clausum fregit*, for trampling down the grass, &c."

Walsh v. Hall, Per Powell. at Wells. 1700. Salk. MSS. Bull. N. P. 85.

So if *J. S.* agrees with the owner of the soil to plough and sow it, and give him half the profits, *J. S.* may have this action *quare clausum fregit*, for treading down the corn, and the owner is not jointly concerned in the growing corn, but is to have half after it is reaped by way of rent; which may be of other things than money; though in *Co. Litt.* 142, it is said, it cannot be of the profits themselves; but that (it seems) must be understood of the natural profits.

Wilson v. Mackreth. 3 Burr. 1824.

So where the action was trespass for entering the plaintiff's close, called *Carr Moss*, and digging and carrying away his peat and turf, it appeared that the *locus in quo* was the waste of the lord of the manor, and that the plaintiff and all those whose estate he had, had *an exclusive right* of digging turves on this place, but that the other commoners had common of pasture thereon; it was adjudged, that though there was no ownership of the soil, yet that the plaintiff having this *separate and exclusive right* to dig turf and peat there, for an invasion of this right trespass would lie.

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So

So where a meadow or common lands are annually divided among the parishioners by lot, after the portion is so marked out, they may respectively maintain trespass, but not before. Weldenn v. Bridgwater. Cro. Eliz. 421.

2. "Possession is a sufficient title to the plaintiff in trespass *vi & armis*, and where a person is in possession, that is the proper action for any injury done to the land or the profits of it."

For where one Mrs. *Moore*, who had no right in the soil, but was entitled under a lease from the crown, in the sole right of digging lead in such a district, and she let and set to the plaintiff all her right of digging lead ore therein during her term, and he was in possession, and brought *trespass on the case* against the defendant for taking the lead, it was held that the plaintiff, being in possession, should have brought trespass *vi & armis*; and he was nonsuited. Harker v. Birbeck. 3 Burr. 1556.

3. "A special property is a sufficient title for the plaintiff in this action."

As where a *sheriff had taken goods under a fieri facias*, and they were forcibly taken away by the defendant, it was adjudged that the sheriff might maintain trespass, though he had only a special property in the goods. Tyrrell v. Tash. Cro. Eliz. 639.

4. "The goods of the church belong to the *church wardens*, and they may maintain trespass for taking them." Hadman v. Ringwood. Cro. Eliz. 145. 197.

But the suit must be commenced while they are in office; for after their year expired they cannot commence a suit, though they may proceed in it after the year, if commenced before. Dent v. Prudence & al. 2 Stra. 852.

At common law the church wardens are elected by the minister and inhabitants at large, but by special custom both may be elected by the inhabitants; however, if the churchwardens bring an action for the goods of the church, and set up an election by the inhabitants at large, they must prove the special custom, or they shall be nonsuited. Dubois v.— G. Hall, Sitt. Tr. 1775. MSS.

*5. *Baron & feme* may join in an action for trespass done on the wife's land, as for breaking the close, &c.; but if it is for taking and carrying away hay, &c. the declaration should lay, *that it grew on her land*, or it will be bad. Cookson v. Castline. Cro. Eliz. 96.

*[404]

For the rule is, that for taking things merely personal, husband and wife cannot join in trespass: but for the taking of things in action or injuries to the land of the wife, they should join: for the latter things survive to the wife, but not the former. Arundel v. Short, &c. Cro. Eliz. 133.

6. *Tenants in common* should join in action of trespass for offences which concern their tenements in common, as for breaking their houses or closes, feeding, wasting or destroying Litt. s. 315.

stroying their grass, cutting their woods, fishing in their piscary, or such like. In which case they should have their action jointly, and recover their damages jointly, because the action is in the personalty, and not in the realty.

Co. Litt. 198. a. And in such case the action shall go to the survivor, if one of them dies.

Id. And the law is the same of coparceners.

Ibid. And if two tenants in common be of goods, as an house, or other personal thing, if one die, his executor shall be tenant in common with the other.

Sutton v. Moody. Salk. 556. 7. Trespass lies by the owner of the soil against a person for breaking his close and hunting there, *and killing his conies*, or other animals *feræ naturæ*; for the owner of the soil has the property of such animals *feræ naturæ* as are found on his land, and killed, and may have trespass for them. As if a hare is started and killed on my land, it is my property; but it is otherwise if hunted into the ground of a third person, for then it is the hunter's.

2 Roll. Ab. 553. 8. Before an entry and actual possession, one cannot maintain an action of trespass, though he hath the freehold in law; therefore an heir before entry cannot have trespass against an abator; but a disseisee may have it against a disseisor for the disseisin itself, because he was in possession, but not for an injury after the disseisin.

6. OF THE PLEADINGS IN THIS ACTION.

And 1st, Those on the part of the

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PLAINTIFF.

1st, Of the Declaration.

Martin v. Kesterton. 2 Black. Rep. 1089. in C. B. 1. If the plaintiff sues out a general writ of trespass *quare clausum fregit*, he may declare either *generally*, or *name the place where the trespass was done*. If he *names the place in his writ*, and declares on it, the defendant cannot vary the place; but if the *writ is general*, and the plaintiff declares generally, or names the place in his declaration, yet may the defendant vary the place, and so put the plaintiff to his new assignment.

Lambert v. Strother. Mich. 14 G. 2. Bull. N. P. 92. For as if the plaintiff declares on a trespass in such a vill the defendant may reply *liberum tenementum*; and if he proves any part of the vill to be his freehold, he must have judgment, the plaintiff is therefore driven to his new assignment; but Judge *Buller*, in this case, is of opinion, that pleading generally *liberum tenementum* would be bad, and that the defendant should give a certain name to his freehold;

hold; for if the plaintiff should also have a freehold in the same vill, he may prove the trespass there, and have judgment.

But if the plaintiff gives the close a name, he must prove a freehold in the close so named. Helwis v. Lomb. Salk. 453.

2. "Where the trespass arises from the abuse of an au- "thority given by law, or a *tort* done subsequent to a lawful "act, it is sufficient in the declaration to state a trespass gen- "erally, and in the replication the particular injury or abuse.

As where the plaintiff declared generally for breaking the house, and carrying away his goods, the defendant justified the taking as a distress damage feasant; the plaintiff replied, that after the distress the defendant had converted them to his own use. The defendant demurred for cause that this was a departure; but the Court held it to be none; for the abuse of the distress made him a trespasser *ab initio*, and it would be of no avail to the plaintiff to state the conversion in his declaration, for it was no way necessary to his action, and if alleged need not be answered: it would be out of time to state it in the declaration, but it must come out in the replication. Gargrave v. Smith. Salk. 221. Bull. N. P. 81.

3. In trespass *de bonis asportatis, the particular goods, &c. taken, must be stated in the declaration.*

*For where the declaration was in trespass for *taking* his *goods* generally, without saying what goods, after a verdict for the plaintiff, judgment was arrested. Bertie v. Pickering. 4 Burr. 2455.

So where it was for taking *piscem suos* generally. *[406] Playter's case. 3 Co. 28.

So where it was for breaking and entering the plaintiff's house, and taking *diversa bona et catalla ipsius querentis*, the judgment was arrested; and the reason of the cases is this: That where the declaration is so general, the defendant cannot justify, for he cannot justify as to *divers goods*. 2dly, That unless the goods are specified, a recovery in this action could not be pleaded in bar to another action brought for taking the same goods. Wyat v. Effington. 2 Stra. 167. 2 Lord Raym. 1410. S. C.

"But this is the case only where the action is founded on "the taking, or injury to the goods themselves; but it is "otherwise where *the taking or injury is laid only by way of* "*aggravation.*"

For where the trespass was for breaking and entering the plaintiff's house, and throwing about and spoiling *his goods*, it was objected on demurrer, that the several goods in the declaration mentioned generally, ought to have been set out: but it was over-ruled; for the spoiling of the goods was only laid in aggravation of the trespass, and Chamberlain v. Greenfield. 3 Wils. 292.

was

was not itself the cause of action, which was the entering the house, and so need not be set out in the declaration.

" So if the things sufficiently appear *by any reference to* " *others set out in the declaration*, they need not be specified."

Layton v. Grindall. Salk. 643.

As where the trespass assigned was entering the plaintiff's house, and taking several keys *pro apertione ostiorum domus prædict.*, it was adjudged in motion on arrest of judgment, that the number of the keys need not be mentioned, as being made sufficiently certain by reference to the house.

4. "In trespass *de bonis asportatis*, the plaintiff should al- " ways set out *a property in, or at least possession of, the goods.*"

Burser v. Martyn. Cro. Jac. 56. Joce v. Mills. Salk. 640. S. P.

In trespass, the plaintiff declared against the defendant *quare equum cepit a persona of the plaintiff.* After a verdict, judgment was arrested; for he had not said *equum suum*, or that he was taken out of his possession; for otherwise it would not appear that the plaintiff had any cause of action if he had neither property nor possession.

Terry v. Stradwick. 2 Lev. 156. *[407]

*And this was ruled so in a still stronger case, where the trespass was for *taking hay off the plaintiff's land*, and judgment was arrested for not saying *his hay*, though the presumption was so strong from the place from whence it was taken.

5. " So the declaration should also state the *value* of the " goods."

Strode v. Hunt. 2 Lev. 430.

For where the plaintiff declared " for breaking and entering his close and carrying away his soil to the value of 40*s.* and continuing the said trespass by digging and carrying away from the 1st of *May* to the first of *June*, to his damage," as the declaration was adjudged to be ill, for not setting out the value of the soil carried away during the *continuando:* but this would be cured by a verdict.

4 Burr. 2455.

F. N. B. 196. Salk. 119.

6. The plaintiff may have one writ for several trespasses; as entering his house, cutting his trees, beating his servants, and carrying away his goods; and these may be joined in one declaration. For to aggravate the damages, the plaintiff may join in his declaration that for which he could not have an action; and the party injured may have his action also.

Dix v. Brookes. 2 Stra. 61.

As where the plaintiff declared in trespass for breaking and entering his house, and beating his wife; it was moved in arrest of judgment, that the wife should have joined, for so she might still have her action for the assault, and the defendant be doubly charged: but the Court held it well; for such offences may be joined to aggravate the trespass, and the

the party injured have an action still. As in the case of a servant, who may have an action for his own injury; and the master for the loss of his service.

But the plaintiff in trespass *vi & armis* cannot recover damages for the loss of the company of his wife, or service of his servant; nor should evidence be admitted to that head. Newman v. Smith. Salk. 642.

7. In trespass *the day laid in the declaration is not material*, for the plaintiff may prove the defendant guilty at any time previous to the action brought, and it shall be good: for the defendant being once a trespasser, shall always be one. Co. Litt. 283 a. Sir Jonathan Peter v. Knoll. Cro. Eliz. 32.

8. In trespasses of a permanent nature, in which the injury is continually renewed, (as by entering the plaintiff's close, and hunting or spoiling his grass,) the declaration should state the trespass with a *continuando*; but where the injuries and acts terminate in themselves, and being once done, cannot be done again, there can be no *continuando*; as killing a number of hares, each of which is a separate act. But these are to be declared on, as done *diversis diebus et vicibus*, between such and such a time. Monckton v. Pashley. Salk. 638. Fontleroy v. Aylmer. 1 Ld Raym. 230. [408]

So where there has been an ouster of possession and re-entry, the ouster, and all acts done during it, may be laid with a *continuando*. And where after an entry, the plaintiff has been again expelled, and again recovered possession, he may have trespass *for the whole time* with a *continuando*. Sacheverel v. Sacheverel. Cro. Eliz. 182.

But if trespass is laid with a *continuando* which cannot be continued, exception should be taken at the trial, for the plaintiff should recover but for one trespass; and if things be laid *continuando* which cannot be so, it is naught after a verdict: but if the trespass be of several particulars, and be laid with a *continuando*, and some cannot be laid with a *continuando*, and other of them may, the *continuando* (after a verdict) shall be held only to apply to trespasses which may be laid with a *continuando*, and the damages given only for those. Per Holt. Salk 630, &c. Brook v. Bishop. Salk. 639.

9. In this action the trespass must always be laid *vi et armis*, or the declaration will be bad in substance, and so held on a general demurrer. 1st, Because it alters the judgment from a *capiatur* to a *misericordia*: secondly, Because it belongs to the jurisdiction of the county-court if the trespass has been without *vi et armis*. Wild goose v. Kellaway. 2 Salk. 636. F. N. B. 196.

10. So it is matter of substance in declaring in trespass *vi et armis*, to say *contra pacem domini regis*. Cro. Jac. 443.

For where the declaration was for breaking the plaintiff's close, and depasturing it, 36 *Car.* 2. *continuando* the depasturing till 4 *Jac.* 2. "Contra pacem *domini nunc regis*; it Incledon v. Burgess. Salk. 636.

was held naught, for there was no *contra pacem* as to the time of king *Charles* the Second.

Day v. Muskett. Salk. 640.

So if the trespass be laid in the late *king's* reign *contra pacem* of the present, it is bad; but such faults are cured by a verdict.

2. Of the Replication.

1. "The declaration in this action being for the most "part general, the replication should bring the issue to a "certain point by traversing one thing in particular."

Cockerel v. Armstrong. Pasc. 11 Geo. 2. C B. Bull, N. P. 93.

As where in trespass for taking a gelding, the defendant pleaded that the place where, &c. was one hundred acres, and *J. S.* seized thereof in fee, and that he as his servant, and by his express order, took the gelding damage feasant, the replication of *de injuria sua propria* would be bad, for that would traverse three or four things, *viz.* that the place was his freehold, defendant his servant, the damage feasance, &c.

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"But the issue need not consist of a single fact; but it "should be on a single point, though it may consist of sev- "eral facts."

Rayley v. Robinson. 2 Burr. 316.

Defendant to this action pleaded to one count "a right of common for his own commonable cattle, levant and couchant;" and to the second, "a licence to cut down a tree to make a gate." The plaintiff replied to the first, That they were not his own commonable cattle, levant and couchant; and as to the second, That the tree was not so applied, traversed the licence, and concluded to the country. The defendant demurred specially to the first replication, for cause, that it was multifarious, comprising three distinct facts; and to the second, for cause, that it concluded to the country, when it should have concluded with an averment: but as to the first the court was of opinion, that the traverse was good, for the several facts make but one point, *viz.* a right of common, which custom necessarily consists of those parts, *viz.* a levancy and couchancy for his commonable cattle. And as to the second, the Court held, that by the denial of the licence, and admitting all the rest, the plaintiff put the substantial matter in evidence, and so concluded rightly to the country.

Cary v. Holt. 2 Stra. 1238. Bull, N. P. 93.

3. Where the plaintiff declares in trespass on his possession, and the defendant makes title and gives colour to the plaintiff, the plaintiff's replication, which traverses the defendant's title without setting up any title in himself, but merely concluding with *de injuria sua propria*, &c. is good, for trespass is a possessory action, which possession is here admitted in giving colour; and the replication lays the defendant's title out of the case, and then it stands on the plaintiff's

plaintiff's possession, which is sufficient against a wrong-doer.

As where in trespass *quare clausum fregit*, the defendant justified that one *J. Wright* was seized in fee, and demised to him, and that the plaintiff claiming by deed of feoffment had entered and been possessed. The plaintiff replied, *protestando*, that *Wright* was not seized in fee, *quod non demisit modo & forma*. And though under this replication the plaintiff made no title in himself, yet he recovered, for being in possession it was sufficient to disprove the title set out by defendant. Fenner v. Fisher. Cro. Eliz. 288.

4. If the plaintiff lays a day in his declaration, and defendant justifies as to that day, the plaintiff may in his replication state another day, and it is no departure, the day being immaterial. (*Ante*. 407. Webley v. Palmer. Salk. 222. [410]

For, to make a departure, there must be a varying in the replication from something materially alleged in the declaration. Primer v. Phillips. Salk. 222.

5. In general, if the defendant pleads that the place is his freehold, the plaintiff may reply three manner of ways: 1st, That the place is *his* freehold, and then he must always traverse the defendant's plea, unless he makes a new assignment, for such is not inconsistent with the defendant's plea, and so a traverse is not necessary. 2. He may derive a title under the defendant himself, and then he must not deny its being the defendant's freehold. 3. He may set up a title not inconsistent with that of the defendant; in which case he may traverse the defendant's title or not as he pleases. Lambert v. Stother. Mic. 14. Geo. 2. C. B. Bull. N. P. 93.

However, the plaintiff is only to put in his new assignment of another place, where the trespass complained of is necessarily local, and plaintiff can recover satisfaction in that place only. Foreman v. Doleman. Gilb. Rep. 136.

2. OF THE PLEADINGS ON THE PART OF THE DEFENDANT.

1. "A distinction is to be observed in pleading, where "the trespass is *transitory*; such as for taking goods, &c. "and *where local*; as *quare clausum fregit*: for in the first "case the defendant may plead generally, that *he was pos-* "*sessed* of the place where, and took the goods damage feas- "ant, *ex. gr.* and the plaintiff is foreclosed to pretend a right "to the place; nor can it be contested in evidence, for pos- "session is justification enough; but in trespass *quare clau-* "*sum fregit* it is otherwise, for there the plaintiff claims the "close in question, and the right may be contested." Anon. Salk. 643.

Therefore in this case, which was trespass *for taking the plaintiff's cattle*, the defendant pleaded, that he was possessed Ibid.

of

of the close, and that the *plaintiff's cattle having trespassed therein he took them*; and the plea on the possession only was held good. So where the trespass was taking and carrying away his goods in *D.* defendant pleaded that the *locus in quo* was his freehold, and that he took them damage feasant: on demurrer the plaintiff had judgment; for the trespass being transitory, no *locus in quo* is supposed, and *D.* is only alleged for a venue; therefore if the defendant will make the place material, it must come on his part to shew a place certain.

Lewis v. Lamb. Salk. 453.

*2. The general issue in this action is *not guilty*, and where a person has been *indicted* for a trespass, and has confessed, and the entry of *cognovit indictamentum* made on the record, he is ever after estopped to plead *not guilty* to an action brought for the same purpose.

2 Hawk. P. C. 333.

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3. Of the Plea of Justification.

Co. Litt. 283.

"As to this, if the defendant has a special justification "*he must plead it*; for he cannot give it in evidence on the "general issue; for *not guilty* denies the taking, but a justification must admit it: and so the evidence would be inconsistent with the plea."

Dryer v. Mills. 1 Stra. 61.

As where in trespass the defendant pleaded not guilty, and would have given in evidence *the taking of the things for a deodand*, the Court refused to admit it; for he might have justified to that effect, and given the plaintiff an opportunity of answering it.

1 Ld. Raym. 73a. Co. Litt. 283. a. Walton v. Sparks. Salk. 287.

So neither can he give in evidence on the general issue that he had in the place a right to common or to a way, or other easement; or that the beasts came through the plaintiff's hedge which he ought to repair; or that he entered to take his emblements; or that the place was an highway; or in aid of an officer in execution of process, or such like special justifications.

2 Roll. ab. 676. 7. Bro. Gen. Iss. 82.

But he may, on *not guilty* pleaded to trespass *vi et armis*, give in evidence a lease for years, not a lease at will, (for that is as a licence countermandable at pleasure,) or that his servant put the cattle in without his assent.

Haywood v. Davis. Salk. 4.

So on the general issue the defendant may give in evidence, that he is tenant in common with the plaintiff (for one tenant in common cannot have trespass against the other, *Litt.* s. 323); but the defendant should plead it in abatement, that the plaintiff was tenant in common with another person; so joint-tenancy should be pleaded in abatement, and cannot be given in evidence on the general issue.

Jones v. Randal, Hil. 165a. Tr. per Pais, 207.

2. In pleading a justification there is a difference in the case of an *officer* acting under process of court, and of a *private person*.

1. In trespass against the *sheriff*, it is a sufficient justification that he shews his writ without shewing a judgment: so it is in the case of his bailiff or officer, with this difference, that the sheriff must shew the writ *was returned*, if returnable; but the bailiff need not, because it is not in his power.

Britton v. Cole, Salk. 408. Cotes v. Mitchell. 3 Lev. 20.

*But in trespass againt the *plaintiff in a former action, or a mere stranger*, they cannot justify, unless they *shew a judgment* as well as an execution; for the judgment might be reversed, and it ought to be at their peril if they take out execution afterwards.

Ibid. *[412]

And the case is the same of all *principal officers of inferior courts*, as has been laid down as to sheriffs, *viz.* that they must shew returnable process returned. This was the case of a sergeant at mace of the sheriff's court of *London*. Principal officers seem to mean those only who have return of writs.

Freeman v. Blewit, Salk. 489.

3. But as to justification under process of inferior courts, it must be observed,

That though an *officer* may justify under the *meane process* of an inferior court, without saying that the cause of action arose within its jurisdiction, yet if he justifies under *process of execution*, he ought to shew that the *cause of action arose within the jurisdiction* of the court, or *at least was so laid*: but that would not be a sufficient justification *to the plaintiff in the action*, who ought to know the extent of the jurisdiction he applies to for redress.

Higginson v. Martyn & Hadley. Mich. 28 Car. 2. Bull. N. P. 83.

3. So if the defendant justifies the taking under a *plaint levied in an inferior court*, and precept to the sheriff to take, the plea should, 1st, If the court was not of record, *set out the proceedings at large*; it is not sufficient to say *taliter processum*. 2. It should be shewn that the debt arose within the jurisdiction. 3. It should say that the precept was *directed by* the said court, not that *it issued out of it*.

Pinager v. Gale. 2 Vent. 100.

4. But if the defendant justifies the taking *as bailiff* of an inferior court (as the leet) for an amercement, for an offence within the leet, it is sufficient for him to say that the offence *was presented* for *non refert* as to him, whether in fact the offence was committed or not. But 2dly, He should state an *estreat by the court or warrant* from the steward, for that is his authority. And in the case of a *private person*, the plea in all cases should further state, first, An amercement *by the jury*; it is not sufficient to state an amercement generally. 2. That the *amercement was affeered* to so much. 3. That the plaintiff was resiant within the leet.

Matthews v. Carew. Salk. 107. Wilton v. Hardingham. Hob. 129. Convers v. Franks. 3 Lev. 19.

3. If

Salk. 409.

3. If one *comes in aid of an officer*, at his request, he may justify as the officer may do; but such request or command is traversable: as in trespass, if the defendant justifies damage feasant, or by distress for rent, he must make himself bailiff to the person having right, or that he did it by his command; but the command is traversable.

Salk. 107.

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4. "And in general, wherever a person justifies a taking "under any authority whatever, he must shew every matter "and part of that authority under which he justifies."

Watkyns v. Johns. Cro. Eliz. 187.

And where the defendant justified the taking of a cloth out of a pack, as deputy of grantee of the place of alnager, and that the piece of cloth had not the alnage seal on it; the plea was on demurrer adjudged to be bad: 1st, Because he did not shew the patent appointing the alnager. 2dly, That it was an office which could be executed by deputy. 3dly, That there being two statutes, 27. *H.* 8. *c.* 12. & 6 *Ed.* 6. *c.* 4. which give a penalty for exposing cloth to sale without the alnage seal, he did not shew on which he sued. 4thly, He did not say where the deed appointing him deputy was sealed and delivered.

And these cases following have been decided as to what justifications are good, and what otherwise.

Reynell v. Champernon. Cro. Car. 165.

1. In trespass for cutting the plaintiff's nets and oars, the defendant justified that the plaintiff and others came into his fishery, and would have taken his fish, wherefore to prevent it, he destroyed their nets, &c. The plea was adjudged ill on demurrer, for *he should have taken them damage feasant*, and not cut and destroyed them.

Stadden v. Harvey. Cro. Jac. 204.

If tenant for life dies, his executor shall have convenient time to remove his cattle and effects off the lands: and therefore where trespass was brought, and the executor pleaded that the cattle remained on the land for six days, *being the time required before he could get a place for the cattle*, it was held to be good.

Tayler v. Fisher. Cro. Eliz. 245.

3. The defendant, in trespass for entering the plaintiff's house, and taking a corselet and pike, pleaded, that he had purchased them from a person to whom they belonged; had entered the plaintiff's house, *by permission of his wife*, and took them; it was adjudged ill, for the wife could give no permission.

Chapman v. Thumblethorp. Cro. Eliz. 329.

4. So in trespass for taking goods, it is a good plea that *they were the property of the defendant himself*, and that finding them in plaintiff's possession, he took them again; *for a man may take his own goods where he finds them* when out of his possession by wrong, and not by his own delivery.

Steel v. Houghton. H. Bl. Rep. 51.

5. To an action of trespass for breaking and entering the plaintiff's land, the defendant justified under a right to go

on

on the plaintiff's land to *glean and gather the ears of corn after the croft was drawn off*; upon general demurrer, it was resolved, that by law there was no such right, and that therefore the justification was bad.

*6. Under the statute of *Merton* the lord has a right to approve part of the common, provided he leaves sufficient for the use of the commoners; but where the tenants have a right to estovers, or to dig gravel, on the waste or common, it shall control the right the lord has under the statute. Dubberly v. Page. 2 T. Rep. 391. *[414]

7. "It is a good justification to an action of trespass "*quare clausum fregit*, that the defendant came on the *locus* "*in quo* in the enjoyment of some easement under a custom."

As was the custom in this case held to be good, for the inhabitants of the vill to dance in the plaintiff's close for their recreation. Abbot v. Weekley. 1 Lev. 176.

So in this case, a custom that all the *inhabitants of the parish of Steeple Bamstead* in *Essex* to play at all lawful games and sports within the close of the plaintiff at all seasonable times of the year, was held to be good; but a custom claiming the same easement *for all persons for the time being*, being in the parish, was held to be bad, as being too general. Fitch v. Rawling & al. 2 Bl. Rep. 393.

8. Other justifications are mentioned before; as it is good that the defendant came on the plaintiff's ground in pursuit of ravenous beasts, &c. &c.

3. "In all cases of pleading, where a trespass *is local or* "*specially assigned by the plaintiff*, and the defendant justifies "at a different place, or in a different manner, the plea "should conclude with a traverse."

As in trespass for taking the plaintiff's cattle at *Hereford*, the defendant justified the taking as bailiff of the manor of *A.* as a *distringas* to compel the plaintiff's appearance at the manor court, and concluded *quæ est eadem transgressio*, without saying *absq. hoc* that the defendant was guilty at *Hereford*, and so traversing the place laid in the declaration; and on special demurrer the plea was held ill for want of the traverse; for it was no answer to the trespass laid at *Hereford*, that not being excluded by the traverse. Benjamin v. Holwell. 1 Wils. 81. Thompson v. Clark. Cro. Eliz. 504. S. P.

"But where the defendant has been a trespasser at the "place laid in the declaration, though not as to the whole, "or it is a continuation of the same trespass, he need not "conclude his plea with a traverse."

As where in trespass for *taking* the plaintiff's cattle at *Teddington*, the defendant justified the taking them at *Kingston* damage feasant, and that he carried them to *Teddington*, where he impounded them; on demurrer it was objected, that Riley v. Packhurst. 1 Wils. 219.

that the justification was local, and therefore that defendant should have traversed the place in the declaration, *sed non allocatur*; for when the defendant says that he impounded them at *Teddington*, if he had no right to take them, he was a trespasser there, and so agreeing in the place, he should not have traversed.

"And it is the same where a trespass is justified in a manner different from what it is assigned: the plea should conclude with a traverse."

Hill v. Prideaux. Cro. Eliz. 484.

For where the trespass assigned was, that the defendant had chased the plaintiff's cattle, *ita quod per fugationem interierunt*; the defendant pleaded that the *locus in quo* was held of him by certain services, and that he distrained the beasts for the services, and put them into pound overt, where they perished *by hunger*, by default of the plaintiff, which is the same trespass: the plea was adjudged to be ill; for having assigned a different cause of the beasts' death, he should have traversed the cause set out by the plaintiff.

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1 Roll. Ab. 128.

4. *Accord and satisfaction* is a good plea in trespass, but not accord alone without satisfaction. As where in trespass for taking the plaintiff's cattle, it was held a bad plea that there was an accord, "that the plaintiff should have his cattle again," for that was *no satisfaction*.

James v. David. 5 T. Rep. 141.

So where in trespass for breaking and entering the plaintiff's close, the defendant pleaded, that he and the plaintiff had agreed to settle all matters in dispute, and to bind themselves in a penalty not to sue each other; this was on demurrer held to be a bad plea, as a plea of accord without satisfaction.

"And the plea should shew *how* the satisfaction was made, "that the Court may judge if it is good."

Hillman v. Uncles. Skin. 391.

For where to trespass *quare clausum fregit* the defendant pleaded that the trespass had been done by him and one *Jane Rowland*, and that after the trespass it had been accorded between the plaintiff and *Jane Rowland*, that she should abate fourteen shillings, which were due to her by the plaintiff's father; and that she had abated them: on demurrer the plea was held bad, for it did not shew *how she had abated the money*; for it should be such as would be an absolute bar to the demand in future, as the satisfaction should be of value. It was further agreed, that though the satisfaction was not to the plaintiff himself, yet being made at his request, and by his consent, that it was good.

Hare v. George. Cro. Eliz. 66.

So in pleading an arbitrement, which is a plea similar in its nature to this, the defendant should shew the place where the submission was, and allege performance of his part.

S. A.

5. *A release* is a good plea in trespass.

But if the defendant plead a release before the time of the action brought, he must also go on and plead it with an *absq. hoc that he is guilty at any time after*; for the plaintiff may prove a trespass at any time before action brought: so that the plea should cover the whole time to the bringing of the action. Webley v. Palmer. Salk. 222.

And if *a trespass is joint*, a release to one is good to all; for though a trespass be committed by several, yet it may be sued against one or against all, for in trespass all are principals, and each is answerable for his fellow's act; and as there can be but one satisfaction, a release to any one is a release of the trespass, and all have equal benefit. Cooke v. Jenner. Hob. 66.

And on this ground if the plaintiff brings a joint action of trespass, and the parties sever in their pleas, and one is tried and found guilty, and damages assessed, the plaintiff may enter a *noli prosequi* as to the others. Parker v. Sir J. Lawrence. Hob. 70. *[416]

And on the same ground, where a trespass was committed by two, and recovery by a verdict of damages against one, this was (by two judges to one) held to be a good plea in bar to an action brought against the other; for plaintiff had elected to bring his action single, and could have but one recompence. Norton's case. Cro. Eliz. 30.

6. It is a good plea to an action of trespass for breaking and entering the plaintiff's house, "That he had become bail for a person then living in the house of the plaintiff, and that the outer door being open, he had broke and entered the house for the purpose of seeking for the principal, in order to render him; and such plea is good without averring that the principal was then actually in the house. Sheers v. Brookes. 2 H. Bl. Rep. 120.

7. By statute 21 *Jac.* 1. *c.* 16. the defendant to an action of trespass *quare clausum fregit* may plead a disclaimer, and that the trespass was by negligence and involuntary, and tender sufficient amends before the action brought; and if the issue be found for the defendant, or the plaintiff be nonsuited, he shall be barred.

But the defendant cannot plead tender of amends *alone*, for the statute only gives such plea in the case of an involuntary trespass and disclaimer. Bailey v. Vivash. 1 Stra. 549. 2 Roll Ab. 570. Co. Litt. 283 a. Salk. 446.

If the defendant pleads tender of amends for any trespass committed by him, he must further plead *what sum* he tendered for amends: an exception to this is where the owner of an estray makes a tender for the keeping. (*Ante* 401.)

8. By stat. 24 *G.* 2. *c.* 44. constables not being liable for any thing done under a justice's warrant, that is a good plea;

but by 7 *Jac. c.* 5. they may plead the general issue, and give the special matter in evidence.

9. The *statute of limitation* is a good plea in this action; it is founded on statute 21 *Jac.* 1. *c.* 16. *s.* 3. which enacts, "That all actions of trespass *quare clausum fregit* shall be "brought within *six years* after the cause of action accrued; "and if on any such actions judgment be given for the "plaintiff, and be afterwards reversed for error, or judgment "be arrested, the plaintiff may bring a new action within "one year after."

Clare v. Frost. 1 Stra. 425.

10. The defendant in pleading may plead *two matters in justification*: As here, 1st, The cutting down a tree for repairs. 2d, That the tree stopped a watercourse, wherefore he cut it.

11. By stat. 7 *Jac.* 1. *c.* 5. it is enacted, "That if any ac- "tion shall be brought against any justice of the peace, con- "stable, &c. for any thing done by virtue or reason of his of- "fice, he may plead the general issue, and give the special "matter in evidence.

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7. OF THE EVIDENCE IN THIS ACTION.

1. OF THE EVIDENCE ON THE PART OF THE PLAINTIFF.

2 Black. Rep. 1165.

1. "The evidence must always follow the issue; that is, "no matter out of it shall be given in evidence which might "have been replied, and would have supported the action; "for the evidence should only go to disprove the facts in "the plea."

Dayrolles v. Howard. 3 Burr. 1385.

As in trespass by the lord against a commoner, for spoiling and destroying his peat and filling up the holes, the defendant justified under a right of common, and because that he was hindered from enjoying his common in so ample a manner, by reason of the heaps of peat, that he removed them and filled up the holes: the plaintiff replied *de injuria sua propria* generally: and on issue joined would have given in evidence, *that there was a sufficiency of common left*: but it was held that he could not, it not being within the issue, which was confined by the facts stated in the plea.

Sipporah v. Bassett. 2id. 225.

2. But if the principal trespass will bear an action, the plaintiff may, under the general clause of *alia enormia fecit*, *give in evidence*, to increase the damages, *any thing that will not itself bear an action*, as *ex. gr.* an injury *ex turpi causa*; but *what would itself bear an action must be stated in the declaration*. As in trespass *quare clausum fregit* the plaintiff would not be allowed to give in evidence, that the defendant then took away his horse, for that would bear an action itself; but

but he might, that he entered his house and debauched his daughter, for that will not bear an action, but is an injury *ex turpi causa*. But this seems to be the case only where the defendant pleads *not guilty*, for there the issue is on the facts stated in the declaration.

But in this case it was ruled, that under the general averment of *alia enormia fecit* the plaintiff can give nothing in evidence except acts which could not with decency be put on the record: therefore where the action was trespass and false imprisonment of the plaintiff on board a Guineaman, it was ruled by Lord *Kenyon*, That the plaintiff could not give in evidence his being in irons till they galled his wrists till they were in a state of mortification, and that he was during all the time exposed to the burning sun and showers in that country, it not having been specially laid. Lowden v. Goodrich. Peake's N. P. Cas. 46.

5. If, in trespass *quare clausum fregit*, the plaintiff sets out the abuttals of his close, he must in evidence prove every part of his abuttals; as if it be a *parte australi* of the mill of *A.* he must prove the mill there, and that it was in the tenure of *A.*; but it will be sufficient though there is an highway between them. So if the abuttal is laid to the east, if proved to the north-east it is sufficient. 2 Roll. Ab. 677.

So if the trespass is laid in an acre, laid with proper abuttals, proof of a trespass in half an acre will be good, for the abuttals extend only to the whole acre. Winkworth v. Mann. Yelv. 114.

4. When the trespass is laid with a *continuando*, the plaintiff ought in evidence to confine himself to the time in the declaration: but he may wave the *continuando*, and prove a trespass on any day before the action brought, or he may give in evidence only part of the time laid in the *continuando*. Per Holt, at Hertford, 4 Ann. Bull. N. P. 86. *[418]

In trespass with a *continuando* to the land, the plaintiff should prove a re-entry, for otherwise he shall only have damages for the first entry. Trials Per Pais. 232.

5. In trespass *de bonis asportatis*, as the plaintiff is obliged to set out the particular goods in his declaration, so he can *only prove the taking of such goods as are mentioned in the declaration*; for as the reason for specifying the goods is to enable the defendant to plead the former action in bar to another for taking the same goods, the plaintiff shall for the same reason be confined in his proof; for if admitted to give evidence of the taking of things not in the declaration, he might recover twice for the same things. Bull. N. P. 81.

6. If the plaintiff makes a new assignment, and the general issue be joined on it, he *cannot prove the defendant guilty at the place mentioned in the plea in bar*, for by the new assignment he waives the place whereto the defendant has pleaded: and if the place assigned by the plaintiff be the very *locus in* Fuston v. Crouch. Cro. Eliz. 492.

quo

quo pleaded by the defendant, yet the defendant should not rejoin that it is so, but plead the general issue, *not guilty*, and at the trial he must have a verdict, because the plaintiff by his new assignment waived that place.

Year Book. 27 H. 8. 7.

Therefore where the defendant justified in a place called *A.* as his freehold, and the plaintiff, by way of new assignment, said the place in which, &c. was called *B.*, it was held no plea to say that *A.* and *B.* are the same place; for by the new assignment the bar was at an end.

Cook q. tam v. Priddle, Taunton Lent Ass. 1785 MSS.

5. In an information for obstructing an excise-officer in searching for prohibited goods, under stat. *Geo.* S, by which a duty is laid on coffee, tea, &c.; the search had been attempted to be made as directed by the statute under a justice's warrant, *which warrant recited information having been given to the justice of run goods* (viz.———) *being lodged in such a place*: the warrant was produced, but the defendant's counsel objected that the information on which the warrant was granted ought likewise to be given in evidence; *but Just.* Buller *overruled the objection*: it was then objected to the proof of the officer's appointment in pursuance of the statute; for though in general it may be proof sufficient of a person being an excise officer, that he has acted as such without producing his appointment, yet the statute, by which these duties are laid, does not give the management of them to the board of excise, but *to persons appointed by the Lords of the Treasury*; and therefore it ought to be shewn that the Lords of the Treasury had allotted the management of these duties to the commissioners of the excise: but this objection the judge also over-ruled.

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OF THE EVIDENCE ON THE PART OF THE DEFENDANT.

1. "If the defendant justifies, if he proves a good title "in himself, though not strictly as set out in the plea, it is "sufficient."

Goodman v. Ayling Yelv. 148.

As where in trespass the defendant justified the taking, by plea, that the house of the plaintiff was held of the Earl of *Northumberland* by homage fealty, *suit of court escuage uncertain*, enclosing his park with pales, and rent of a pound of cummin, and he for three years' rent and subtraction of suit justified the taking; he proved, and the injury found that he held by homage and fealty, and enclosing his park, and a pound of cummin: and the defendant had judgment; for the finding agreed in substance with the title set out.

Wood v. Chessal. 2 Black. Rep. 1254. & cas. Ibid.

2. In trespass against officers of the excise and customs, they may plead the general issue, and give the special matter in evidence.

3. There

3. There is a difference to be observed as to the evidence in actions against the sheriff or his officers for tortious taking of goods in execution where the plaintiff has been *the defendant in the original action*, and where the action is by a *stranger*, whose goods have been taken.

Where the action is *by a stranger*, whose goods have been wrongfully taken by the sheriff under a *fi. fa.* or other execution issued against another person, the sheriff or his officers, in justifying under the writ, is obliged *to produce or prove a copy of the judgment* upon which the *fi. fa.* issued. Martyn v. Podger. 5 Burr 2631.

But if the action is *by the person against whom the* fi. fa. *issued*, (that is the defendant in the original action,) in that case, a copy of the judgment need not be given in evidence. Lake v. Billers. Ld. Raym. 735.

4. In trespass for taking goods the defendant justified under a *distress for rent*: it was ruled, 1. That the defendant should prove a letting at a *certain rent*, and that the rent was due at the time of taking the distress: 2. That in case the goods had been removed off the premises, that the notice should specify the place to which they were removed, and also contain an inventory of the goods. Moore v. Holmber, per Eyre. C. B. Maidstone Sum. Ass. 1790. MSS. [420]

5. If trespass be brought against one *simul cum* others, if nothing be proved against one, he may be examined as a witness for the rest. Case of Page & Crook. Style 401.

3. THE VERDICT, DAMAGES, JUDGMENT, AND COSTS.

1st, OF THE VERDICT, DAMAGES, AND JUDGMENT.

1. The plaintiff in this action cannot recover *more for damages* than he has laid in his declaration, but for damages *and costs* together, he may have judgment for more than he laid, for the suit may have been of long continuance. Dawkes v. Pilfield. Cro. Jac. 297.

2. In a joint action of trespass, *where the jury find the defendants jointly guilty, they cannot sever the damages* according to the degrees of guilt: and therefore where in the *Common Pleas* the plaintiffs in this action were declared against jointly, and a verdict against one for one shilling, and against the other for forty shillings, and judgment was entered up accordingly; on error brought into the *King's Bench* the judgment was reversed. Hill & al. v. Goodchild. 5 Burr. 2790.

" And the case is the same where there is a judgment by " default."

For where the case was so, and on a writ of enquiry the damages were found as to one, 20*l.*, and as to the other, one shilling, judgment was arrested. Onslow v. Orchard. 1 Stra. 422.

But

Mitchell v. Millbank. 6 T. Rep. 199.

But if the plaintiff has not entered up *final judgment*, the Court will set aside all the writs of enquiry, and will not arrest the judgment.

But this is the case where the defendants *plead jointly*: for if they *sever in their pleas*, different damages may be assessed as to each.

Chapman v. House & al. 2 Stra. 1140.

For where in trespass against three, one let judgment go by default; another pleaded not guilty; and the third demurred to the declaration; before trial of the general issue, there was likewise a writ to assess damages on the judgment by default, and contingent damages on the demurrer: the jury gave a verdict for the defendant on not guilty, and assessed 100*l.* as to one of the other defendants, and one shilling as to the other: and Chief Justice *Lee* was of opinion, that the judgment should be accordingly, they having severed in their pleas.

So the rule first laid down seems to apply only *where the finding is joint*: and that the jury may find them severally guilty as to part, and not guilty as to part, and assess damages severally.

Biggs v. Greenfield. 1 Stra. 810. *[421]

*3. Where there are two defendants sued jointly who sever in their defence, or if one lets judgment go by default, and the other justifies: as in trespass for taking goods against two; if one lets judgment go by default, or one pleads not guilty, and the other justifies the taking as a distress, or by licence from the plaintiff to sell, or that the plaintiff gave him the goods; if the defendant who justifies has a verdict, judgment shall be arrested as to the other, since upon the whole it appears that the plaintiff had no cause of action.

Tilly v. Moody. Cit. Hob. 54.

4. "The jury in finding their verdict may vary from the "declaration, and find only part of what is laid."

2 Roll. Ab. 694. Cro. Car. 54.

As if the declaration be for taking a stack of rye, they may find the defendant guilty as to five quarters, and not guilty as to the rest; so if the declaration be for cutting and taking away trees, they may find defendant guilty of the taking; though not of the cutting.

2. OF THE COSTS TO THE PLAINTIFF.

This is founded on several statutes, the first of which was the statute of *Gloucester*. The statute of *Gloucester* gives costs in all cases where there are damages. The next statute after this was 43 *Eliz. c.* 6. which enacts, "That in actions "personal not being for title to land, if the judge certifies "that the damages are under forty shillings, the plaintiff "shall have no more costs than damages."

This

This statute was for the purpose *of taking away costs* from the plaintiff where the damages were under forty shillings, by enabling the judge to give a certificate to that purpose, as otherwise, under the statute of *Gloucester*, the plaintiff would have cost, by reason of the damages: and certificates have been granted on it, to take away the plaintiff's costs. *Vid. case in marg.*

Walker v. Robinson. 1 Wils. 93. & cas. ib. 2 Stra. 1132. S. C.

2. The next statute was 22 & 23 *Car.* 2. *c.* 9. which enacts, "That in trespass and other actions personal, if the jury "find under forty shillings damages, the plaintiff shall have "no more costs than damages, unless the judge shall certify "*that the freehold or title to the land came principally in ques-* "*tion.*"

As by the first part of this statute costs were taken away from all cases of trespass under forty shillings, *it gave them* to the plaintiff in one case; that is, where the freehold or title to the land did come in question, the damages in such case being in general but small, the land itself being the object.

Accordingly these decisions have taken place:

*1. Though the words of the statute are *trespass* in general, yet the statute only extends to *trespass quare clausum fregit*; that is, to cases wherein the freehold could come in question, and not to trespass *de bonis asportatis*, or *trover*, or such actions; that is, in those actions, be the damages however small, the plaintiff shall have his costs, because in these the freehold could not come in question: but in trespass *quare clausum fregit*, in which the freehold *could* come in question, the plaintiff shall not have his full costs unless the judge shall certify *that the freehold did come in question.*

Moor v. Hall. Trin. 1 G. 3. Bulk N. P. 329. *[422]

2. Therefore, if it appears from the pleadings themselves that the title to the land did come in question *(as where a view was granted)* there the plaintiff shall have his costs without any certificate.

Kempeteg v. Deacon. 1 Ld. Raym. 76. 2 Salk. 665. S. C.

So where to trespass *quare clausum fregit* the defendant justified for a way, and the plaintiff replied *extra viam*, upon which issue was joined, and two pence damages; the plaintiff had his full costs without a certificate, for it appeared that the freehold was in question.

Higgins v. Jennings. 2 Stra. 756. Beal v. Moore. 2 Stra. 1168. S. P.

3. "So that the cases in which a certificate is necessary "are, when by presumption the freehold might come in "question, but it is doubtful whether it did so or not; in "these cases a certificate is required."

As where the trespass was for breaking the plaintiff's close, and taking and carrying away divers quantities of peat and turf, damages one shilling; there being no certificate, the

Clegg v. Molyneaux. Dougl. 750.

the Court held that the plaintiff should have no more costs than damages, as the freehold might come in question.

Blunt v. Miller. 1 Stra. 645.

So where the trespass was for breaking and entering the plaintiff's house, and keeping him out of possession for a month.

Anon. 2 Vent. 48.

So where it was for breaking the plaintiff's close, and putting stakes on the land.

Hill v. Reeves. C. B. Pasch. 3 G. 1. Birch v. Dassy. C. B. Tr. 3 G. 1. Bull. N. P. 329.

So for breaking the plaintiff's house, and destroying his window-shuts and bolts: so for cutting his trees. In all these cases the damages being under forty shillings, and no certificate, as the freehold might have come in question, the Court held that the plaintiff should have no more costs than damages.

Doe v. Davies. 6 T. Rep. 593.

And this is the case of *trespass for the mesne profits* brought by the nominal plaintiff in ejectment, in which case if the damages given are under forty shillings, the plaintiff shall have no more costs than damages.

4. "And therefore, if it appears from the pleadings that "the freehold could not come in question, the plaintiff shall "have his full costs, though the damages are under forty shil-"lings."

Lord Nacte v. Tebb. 2 Black. Rep. 1151.

*[423]

*As where the trespass was for breaking and entering the plaintiff's *free warren* and killing his game, and damages one shilling, the plaintiff had his full costs; for the freehold could not come in question on the right of franchise of free warren.

Keen v. Whistler. Gilb. Rep. 197.

So where the trespass was for entering the plaintiff's close, and chasing his cows and fowls, and damages under forty shillings, the plaintiff had his full costs. *S. P. Thompson* v. *Berry*, 1 *Stra.* 551.

This is the case of all trespasses *de bonis asportatis*. In which case of *asportavit* of personal things, there are always full costs.

Reeves v. Butler. Gilb. Eq. Rep. 196.

5. But there are certain exceptions to be observed; as first, if there are two counts in the declaration, and one is *de bonis asportatis*, but in the other the freehold might come in question, if the jury finds damages entire, though under forty shillings, the plaintiff shall have his full costs; for as part of the damages must be applied to count *de bonis asportatis* it shall carry costs for the whole: but it had been otherwise had the jury found *not guilty* as to that count, and a verdict on the other under forty shillings.

Norris v. Waldron. 2 Black. Rep. 1199.

So if there are many counts in a declaration, though for different causes of action, if the plaintiff has a verdict on one count, he shall have costs of the whole declaration.

2. "Where

2. Where *special damages* are laid by way of aggravation, "if they *are of themselves actionable*, the plaintiff shall have "his full costs though the damages are under forty shillings; "but if the *special damage* laid *would not bear an action*, the "plaintiff shall have no more costs than damages if under "forty shillings, if it is trespass which requires a certificate." 1 Stra. 192.

As where the trespass was for putting diseased cattle into the plaintiff's close *per quod* his cattle were infected, and verdict for the plaintiff damages twenty shillings, he had his full costs, because the special damage was itself actionable. Anderson v. Buckton. 1 Stra. 192.

But where the plaintiff declared in trespass for entering his house, and making an affray and continuing there till the plaintiff gave him a note for 6*l*., verdict for the plaintiff, and one guinea damages, it was adjudged, That the continuing was only aggravation, and no distinct actionable fact: and therefore the damages being under forty shillings, the plaintiff could have no more costs than damages; besides, too, the freehold might have come in question. Appleton v. Smith. 3 Burr. 1282.

*3. Where *a cause was originally commenced in an inferior court, if removed into K. B. or C. B.* and the damages found are under forty shillings, the plaintiff shall have his full costs without a certificate. Roop v. Scritch. 4 Mod. 378. *[424]

4. On *writs of inquiry* in cases within the statute, the plaintiff shall have his full costs, though his damages are under forty shillings. Sheldon v. Ludgate. Trin. 3 Geo. C. B. Bull. N. P. 329.

5. Where there is a plea of justification which goes to the "whole trespass, if the plaintiff has a verdict, though for a "sum under forty shillings, he shall have his whole costs, "without a certificate."

As where in trespass for breaking and entering the plaintiff's close, and breaking and prostrating his fences, and the defendant pleaded first, not guilty; 2dly, a *licence* to all the trespasses in the declaration mentioned; and the plaintiff had a verdict for one shilling, and the judge did not certify; the Court of *C. P.* held, that he was entitled to full costs. Redridge v. Palmer. 2 H. Bl. Rep. 2.

6. By stat. 4 & 5 *W.* & *M. c.* 23. "Every apprentice, "inferior tradesman, or dissolute person, who is convicted of "a trespass in fishing, hunting, or fowling in another's "ground shall pay full costs."

If a person is an inferior tradesman, it matters not what his qualification is in point of estate, for if convicted of such trespass, he shall pay full costs." Bennet v. Talbois. 1 Ld. Raym. 149.

But it seems not easy to be decided who is an inferior tradesman, the Court being equally divided in the question, though it seemed the better opinion that it should have been Buxton v. Mingay. 2 Wils. 70.

left to the jury to decide, who was or was not an inferior tradesman? The defendant was a surgeon and apothecary.

Pall[a]nt v. Roll. 2 Bl. Rep. 900.

But 1st, a gentleman's huntsman is not a dissolute person within the statute: 2dly, The Court held in this case that if the plaintiff declares against a defendant as a dissolute person, who proves not to be so, that he shall not for that reason be nonsuited; for the statute gives no new cause of action, the trespass sued for is still as before; and this is *only* a collateral matter affecting the costs: so that if the costs are under forty shillings, the plaintiff shall have no more costs than damages.

7. By stat. 8 and 9 *W.* 3. *c.* 11. "In all actions of trespass "in which the judge shall certify the *trespass to be wilful and* "*malicious*, though the damages are under forty shillings, "the plaintiff shall have full costs."

3 Bl. Com. 214.

And every trespass is wilful where the defendant having notice to depart, or is warned not to come on the land, yet does so notwithstanding, and *malicious* where it appears to be done to harrass the defendant.

Gely v. Day & al. Winton. Sum. Ass. 1783. MSS.

Therefore where the defendants were playing at cricket on the plaintiff's ground, and were warned to go off, notwithstanding which they continued to play, and damages *thirty* shillings, the judge (Barron *Perryn*) was applied to for a certificate, and a case cited of *Swinnerton* v. *Jarvis*, K. B. in which it had been held, That the judge was obliged to certify: the judge at first was of opinion, that here being no *new trespass but a continuation of the former*, it differed from that case; but afterwards having consulted with Justice *Heath*, he said the point had been determined, and that the judge had no discretion, even where the trespass was a continuation of that committed before notice; and he certified accordingly.

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This case was mentioned by Justice *Gould*, *Surry* Sum. Ass. 1792, and recognized as law; and he certified in a similar case.

Ford v. Parr & al. 2 Wils. 21.

The certificate by the judge under this statute must be *made in court* after the trial, and cannot be given afterwards.

It may not be amiss to observe on the object of these two last mentioned statutes, that, as under stat. 22 & 23 *Car.* 2. the damages being under forty shillings, the plaintiff was deprived of his costs, this stat. 8 & 9 *W.* 3. was for the purpose of giving them to him in the particular case of a wilful and a malicious trespass; and as the not paying of costs was a benefit to the defendant, the statute 4 & 5 *W. & M.* was to take that away and annex costs as a punishment, in case of trespass by apprentices, &c.

Vide Cases of certificates as to costs, in case of Excise-Officers, *ante*.

3. OF THE COSTS TO THE DEFENDANT.

1. By stat. 4 *Jac.* 1. *c.* 3. "If any person commences an "action of trespass or other actions in which the plaintiff "might have his costs, and after the defendant's appearance "becomes nonsuited, or verdict passes against him, the de- "fendant shall have costs."

2. By stat. 8 & 9. *W.* 3. *c.* 11. "In trespass against sev- "eral, if any one or more is acquitted, he shall have his costs "against the plaintiff, unless the judge shall certify upon the "record that there was good cause for making him a defend- "ant."

This statute is confined to trespass *vi et armis* only and does not extend to trespass on the case; for all statutes giving costs are to be construed strictly, and case is not mentioned. Dibben v. Cook. 2 Stra. 1015.

3. By stat. 7. *Jac.* 1. *c.* 5, "If trespass *vi et armis* or case "be brought against any justice of peace, mayor, bailiff, or "constable, for any thing done by virtue of their office, if "they have a verdict, or the plaintiff be nonsuited, or suffer "any discontinuance, the defendant shall have his double "costs allowed by the judge who tried the cause." [426]

This act has been construed to extend to under-sheriffs and deputy constables, though not mentioned.

But the judge *who tries the cause* must certify that the defendant was acting in execution of his office, and order the *postea* to be marked for double costs; for the Court cannot do it after trial upon affidavit. Anon. 2 Vent. 45. Grindley v. Holloway. Dougl. 294.

But where there is a special verdict, and it appears from the fact there found that the defendant was acting by virtue of his office, the master must tax double costs, though there has been no certificate or allowance by the judge. Rann v. Pickins. Dougl. 27. in notis.

So where the plaintiff *discontinued* by leave of the Court, upon an affidavit that the cause was against the defendant for what he had done as a justice of peace, the Court gave him a *rule to the master to tax double costs*, which was made absolute: for where the plaintiff discontinues with leave of the Court, it is always in payment of costs: and that in this case is double costs. Devinish v. Martyn. Pasch. 1734. Bull. N. P. 333. 2 Stra. 958. S. C.

4. By stat. 21. *Jac.* 1. *c.* 12. the provisions of this statute are extended to churchwardens and overseers of the poor.

5. In

Tillett v. Broad. Surry Lent. Ass. 1792, and K. B. Trin. 32 G. 3. MSS.

5. In this case, which was trespass for breaking and entering the plaintiff's close, the defendant justified under a right of way laid in different manners; as 1st, By prescription: 2dly, Under a demise of a field, called *Brewer's Field*, with *all ways* leading thereto: 3dly, By reason of unity of possession. The cause was referred at the assizes, and the costs of the cause was to abide the event of the award. The arbitrator awarded, That the defendant had a right *of* way over the *locus in quo*, but not by any of the manners laid in the plea, but as a way of necessity. Upon the question coming before the Court, they were of opinion, That as the costs were to abide the legal event of the suit; and as the defendant had not given evidence in support of his pleas as he had pleaded them, though under the award he had a right of way, yet that the plaintiff should have his costs.

END OF THE FIRST VOLUME.

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